Petition

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No. 80-

In the Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

MACHINISTS NON-PARTISAN POLITICAL LEAGUE, RESPONDENT.

FEDERAL ELECTION COMMISSION, PETITIONER,

v.

CITIZENS FOR DEMOCRATIC ALTERNATIVES IN 1980, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

(1) Whether committees which advocate the nomination of one individual for election to federal office, and oppose the nomination of others are subject to FECA's contribution limitations.

(2) Whether subpoenas issued by the Commission should be enforced in accordance with established precedent of this Court, not set aside pending judicial resolution of substantive jurisdictional questions.*

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* The only parties to this action are as stated in the caption.

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FEDERAL ELECTION COMMISSION, PETITIONER,

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CITIZENS FOR DEMOCRATIC ALTERNATIVES IN 1980, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Federal Election Commission ("FEC" or "Commission") respectfully petitions this Court for a writ of certiorari to review and reverse the judgments of the United States Court of Appeals for the District of Columbia Circuit in *Federal Election Commission* v. *Machinists Non-Partisan Political League*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9151 (D.C. Cir. May 19, 1981) and *Federal Election Com-*

mission v. *Citizens for Democratic Alternatives in 1980*, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9152 (D.C. Cir. May 19, 1981).

OPINIONS BELOW

The May 19, 1981 opinions of the court of appeals vacating the district court's Orders enforcing the Commission's subpoenas issued to the Machinists Non-Partisan Political League ("MNPL") and Citizens for Democratic Alternatives in 1980 ("CDA") are not yet officially reported and appear at Appendix ("App.") A and B, respectively. The January 30, 1980 Order of the United States District Court for the District of Columbia enforcing the Commission's subpoena issued to MNPL is unreported and appears at App. C. And the February 29, 1980, Order of the United States District Court for the District of Columbia enforcing the Commission's subpoena issued to CDA, also unreported, appears at App. D.

JURISDICTION

The jurisdiction of this Court is conferred by 28 U.S.C. § 1254(1) (1980).

STATUTES INVOLVED

These cases concern several provisions of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 et seq. ("FECA" or "the Act");[1] spe-

[1] The Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972), was amended by the Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974); by the Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (1976); by the Federal Election Campaign Act Amendments of 1977, Title V, Sec. 502, Pub. L. No. 95-216, 91 Stat. 1655 (1977); and by the Federal Election Campaign Act Amend-

cifically 2 U.S.C. §§ 431(d), 437c(b)(1), 437d(a)(3), (4), (9), (10), 437g, 441a(a)(2)(C), 441b (1976) and 2 U.S.C. §§ 431(4), 437c(b)(1), 437d(a)(3), (4), (9), 437g and 441a(a)(2) (1979). For the Court's convenience, these provisions are set forth at App. E to this petition.

STATEMENT OF THE CASE

These cases are subpoena enforcement actions arising out of the FEC's investigation into whether certain groups, including CDA and the International Association of Machinists ("IAM"), through its separate, segregated fund,[2] violated contribution limitations set forth in FECA.[3] The court of appeals

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ments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980). The relevant provisions of the Act are codified in Title 2, United States Code.

[2] Respondent MNPL is the separate, segregated fund of the IAM, 2 U.S.C. § 441b(b)(2)(C), 11 C.F.R. § 100.5(b), registered with the Commission as a multicandidate political committee and subject to FECA. 11 C.F.R. § 100.5(e)(3). Thus MNPL is not only subject to the contribution limitations of 2 U.S.C. § 441a, but also to the restrictions of 2 U.S.C. § 441b as to any of its activities in connection with federal elections. CDA is a political committee registered with the FEC which has made contributions to 5 federal candidates. 2 U.S.C. §§ 432, 441a(a), 11 C.F.R. § 100.5(e).

[3] The Commission had initiated its investigation into these matters after it received a signed, sworn complaint alleging, *inter alia*, that certain political committees were affiliated under FECA, 2 U.S.C. §§ 433, 441a(a)(5), 11 C.F.R. § 110.3(a)(1)(ii)(D) and thus subject to a single $5,000 contribution limitation, 2 U.S.C. § 441a(a)(1)(C), (2)(C); and that MNPL had contributed in excess of $5,000 to the allegedly affiliated committees in violation of 2 U.S.C. § 441a(a)(2)(C). The Commission found reason to believe, 2 U.S.C. § 437g(a), that the Act may have been violated and in furtherance of its investigation, issued the subpoenas challenged below. 2 U.S.C.

(Wald, J.) reversed the district courts' enforcement of the subpoenas in question on the ground that contributions to committees seeking the presidential nomination for an undeclared candidate, Edward M. Kennedy, were not within the coverage and the limitations of FECA.[4] Explicitly ruling that the ordinary standard of review does not apply to cases in which the Commission seeks to enforce its subpoenas, the court held that the Commission erred when it determined, on the basis of a complaint, that there was reason to believe that the committees involved had violated FECA's contribution limitations. The court reversed the district court's enforcement of the subpoenas on the ground that such jurisdictional questions must be decided prior to enforcement and concluded that the Commission would be incorrect if it applied FECA's limits on contributions to such committees.[5] On June 9, 1971, by a vote of 6-0, the Commission determined to seek review of the appellate court's judgments by filing this petition.

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§§ 437g(a)(2), 437d(a)(1), (3). When MNPL and CDA refused to comply with the subpoenas, the Commission filed the petitions which began these actions.

[4] The district court, relying, *inter alia*, on this Court's analysis in *United States* v. *Morton Salt*, 338 U.S. 632 (1950) (*"Morton Salt"*) ordered MNPL and CDA to comply with the Commission's subpoenas and produce the documents requested. Both MNPL and CDA filed applications for stays of the court's orders with the district court and the court of appeals which were denied. MNPL also filed an application for a stay of the order with this Court which was also denied. *MNPL* v. *FEC*, 447 U.S. 918, 100 S.Ct. 3006, 3007 (1980). Subsequently MNPL and CDA produced the documents requested in the Commission's subpoenas.

[5] The Democratic Senatorial Campaign Committee and the Democratic Congressional Campaign Committee filed a joint motion to intervene in *FEC* v. *MNPL* on June 2, 1981. Both the FEC and MNPL filed motions in opposition, and the court of appeals denied the motion on June 22, 1981.

REASONS WHY THE WRIT SHOULD ISSUE

THE COURT OF APPEALS HAS DECIDED IMPORTANT QUESTIONS AS TO THE PROPER CONSTRUCTION OF THE FEDERAL ELECTION CAMPAIGN ACT WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This Court should issue the writ as requested to hear and decide important questions as to the scope of the Federal Election Campaign Act. The substantive issue decided by the court below—that FECA does not limit contributions to committees which advocate the nomination of undeclared candidates for election to federal office—impacts profoundly on campaign financing, placing declared candidates at a clear disadvantage to those who delay candidacy while campaigns without limit occur on their behalf. The procedural question—that subpoenas issued by the Commission will not be enforced by federal courts in accordance with established precedent of this Court, but can be set aside pending judicial resolution of issues relating to jurisdiction—will have a substantial impact upon the Commission's administration and enforcement of FECA. It is imperative that this Court decide these questions prior to the 1982 election so that all participants in that political process can be certain as to their proper and final resolution.

The judgments of the court below have created, for the first time, two classes of political committees and activities which are dependent on the candidacy of the individual they support—one class of committees supporting declared candidates subject to FECA and another class of committees supporting potential candidates operating outside the scope of the Act. Draft committees, not subject to FECA's

contribution limitations, will have the potential of funneling large aggregations of money, including corporate and union treasury funds, into federal campaigns. Such committees, able to accept unlimited funds, will be in direct competition with those committees supporting candidates. A proliferation of draft committees will severely damage the statutory scheme enacted by Congress and may completely circumvent the provisions of FECA. Such a result was certainly not the intent of Congress when it enacted FECA, and the appellate court's judgments facilitating this result must be reversed.

I. CONGRESS DEFINED THE TERM "POLITICAL COMMITTEE" TO INCLUDE GROUPS ORGANIZED TO DRAFT A CANDIDATE FOR NOMINATION AND ELECTION TO FEDERAL OFFICE AND TO OPPOSE THE NOMINATION OF OTHER CANDIDATES AND THE APPELLATE COURT'S CONCLUSION TO THE CONTRARY MUST BE REVERSED.

The plain meaning of "political committee" as first defined by Congress in the 1971 Act, and as subsequently modified, is not limited to groups organized to support declared candidates.[6] The language of the statute itself clearly includes, as political committees, groups organized to advocate the nomination of an individual for election to federal office without regard to said individual's declaration of candidacy, and groups organized to oppose the nomination of an individual to federal office. Indeed,

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[6] This Court has "often observed that the starting point in every case involving stautory construction is 'the language employed by Congress.'" *CBS, Inc.* v. *Federal Communications Commission*, —— U.S. ——, 101 S.Ct. 2813, 2820, 2821 (July 1, 1981), *quoting Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979).

Congress specifically rejected a legislative proposal which would have limited "political committee" to candidate committees. The House of Representatives, in H.R. 11060, defined "political committee" as "any committee, association or organization which accepts contributions or makes expenditures for the purpose of influencing or attempting to influence the election of one or more *candidates* for Federal elective office." H.R. 11060, 92d Cong., 1st Sess. at 3 (1971) (emphasis added); H.R. Rep. No. 92-564, 92d Cong., 1st Sess. at 7 (1971); *see also* 118 Cong. Rec. 320 (1972). However, as passed by Congress, the definition of "political committee" includes "any individual, committee, association or organization which accepts contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000," Pub. L. No. 92-225, § 591, 86 Stat. 8 (1972); and includes within the terms "contribution" and "expenditure" a "loan . . . or anything of value . . . made for the purpose of influencing the nomination for election or election of *any person* to Federal office . . . or for the expression of a preference for the *nomination of persons* for election to the office of President." *Id.* (emphasis added). 2 U.S.C. § 431(d), (e)(1), (f)(1) (1976); 2 U.S.C. § 431(4), (8)(A), (9)(A) (1979).

Inasmuch as the activities of the committees herein were undertaken to influence the nomination for election of Senator Kennedy to the office of President, the groups conducting such activities are political committees within the meaning of FECA.[7] It

[7] IAM has admitted that, through its president, William Winpisinger, MNPL and local IAM officers, it encouraged and helped organize groups such as CDA intent on promoting Senator Kennedy's candidacy and on preventing the nomina-

stretches credibility to hold, as did the court of appeals herein, that an organized attempt to influence the nomination of an individual for election to the office of President, by way of encouraging said individual to declare his or her candidacy and by way of opposing the nomination of other individuals, is not an attempt to influence the nomination process itself.[8] Indeed, even the court of appeals recognized that those committees whose "major purpose . . . is the *nomination* or election of a candidate . . . fall within the core area sought to be addressed by Congress" and that "they are, by definition, *campaign related.*" App. A at 24a *citing Buckley* v. *Valeo*, 424 U.S. 1, 79 (1976) (*"Buckley"*). And this Court has specifically held that "dollars given to another person or organization that are *earmarked for political purposes* are contributions under the Act." 424 U.S. at 24 n.24 (emphasis added); *see* 424 U.S.

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tion for reelection of President Carter as president. Appellant's Brief in *MNPL* v. *FEC*, No. 80-1136 at 5-10. CDA has stated that its purpose was to generate "political support within the Democratic party for [an] . . . alternative to the reelection of President Carter . . . the efforts bore fruit when Senator Kennedy formally declared his candidacy." Appellant's Brief in *CDA* v. *FEC*, No. 80-1256 at 5-6. Thus, at a minimum, CDA's activities to defeat the nomination of President Carter, and MNPL's contributions to CDA for such activities come within the scope of FECA.

[8] *See Federal Election Commission* v. *Wisconsin Democrats for Change in 1980*, —— F. Supp. ——, No. 80-C-123, Opinion and Order at 4, (W.D. Wisc. April 24, 1980); *Federal Election Commission* v. *Florida for Kennedy Committee*, 492 F. Supp. 587, 595 (S.D. Fla. 1980) (the court could not "hold that the activities of the various draft committees were efforts solely to convince the Senator to run, rather than to help elect him").

at 80 n.107. Certainly, the committees herein received "contributions" as that term has been defined by Congress and by this Court. These groups are thus political committees under FECA and the holdings of the court of appeals to the contrary must be reversed.

Moreover, the clear error in the judgments rendered by the court of appeals herein is emphasized by the court's failure to distinguish between separate, segregated funds such as MNPL[9] and other political committees organized as draft groups. *See California Medical Association* v. *Federal Election Commission*, 641 F.2d 619, 631 (9th Cir. 1980) (en banc), *aff'd* —— U.S. ——, 101 S.Ct. 2712 (June 26, 1981) (*"CMA* v. *FEC"*). The court's blanket exemption of "draft" activities from the purview of FECA and the Commission, even where such activities are conducted by separate, segregated funds is a serious departure from the statute as legislated. Under the interpretation of FECA rendered by the court of appeals in these cases, separate, segregated funds seem to be free to collect and spend unlimited monies for "draft" activities. Congress has clearly prohibited the expenditure of all general treasury funds in connection with federal elections. 2 U.S.C. § 441b. And this Court has recognized that the exception to this prohibition—contributions to and expenditures by separate, segregated funds—requires strict accounting and separation of voluntary contributions from general treasury funds. *Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385 (1972). The court of appeals' judgments which substantially re-

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[9] *See* note 2, *supra*.

write the statute enacted by Congress [10] should be reviewed and reversed by this Court.[11]

II. THE APPELLATE COURT ERRED IN REFUSING TO ENFORCE THE COMMISSION'S SUBPOENAS PENDING JUDICIAL RESOLUTION OF SUBSTANTIVE JURISDICTIONAL QUESTIONS.

This Court and federal circuit courts, including the District of Columbia, recognizing the important governmental interest in expeditious investigations of statutory violations, established the principle that the scope of issues to be reviewed in subpoena enforcement actions is narrow, *i.e.*, limited to whether the agency has the statutory authority to issue the

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[10] The power to regulate federal elections rests with the Congress. *United States Constitution*, art. 1, § 4. *Buckley*, 424 U.S. at 13; *Burroughs* v. *United States*, 290 U.S. 534, 545 (1934); *Ex Parte Yarbrough*, 110 U.S. 651, 657-58 (1884).

[11] The court also erred in concluding that the Commission's action in these cases was a "novel" extension of the FEC's authority. While these cases represent the first action by the Commission to investigate violations by draft groups of FECA's limits on contributions, the Commission, through its advisory opinion process, has consistently construed the term "political committee" as not requiring that a group support a particular candidate for federal office. Advisory Opinion ("AO") 1975-81, AO 1979-40, AO 1979-41, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶¶ 5183, 5425, 5427; *see also* AO 1979-26, AO 1979-49, 1 Fed. Elec. Camp. Fin. Guide (CCH) ¶¶ 5408, 5433. The construction by the Commission of the statute it administers is to be accorded great weight by the courts, especially in the context of summary subpoena enforcement proceedings. *National Conservative Political Action Committee, et al.* v. *Federal Election Commission*, 626 F.2d 953, 956 n.7 (D.C. Cir. 1980) *citing National Labor Relations Board* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974) and *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

subpoena, whether the demand is not too indefinite and whether the information is reasonably relevant to the inquiry. *Morton Salt*, 338 U.S. at 652. *See Donaldson* v. *United States*, 400 U.S. 517, 526, 527 (1971); *Ryan* v. *United States*, 379 U.S. 61, 62 (1964); *United States* v. *Powell*, 379 U.S. 48, 51 (1964); *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 214 (1946) ("*Oklahoma Press*"); *Endicott Johnson* v. *Perkins*, 317 U.S. 501, 509 (1943); *Federal Election Commission* v. *Lance*, 617 F.2d 365, 368 (5th Cir. 1980) ("the Supreme Court has clearly indicated that a court's role in a proceeding to enforce an administrative subpoena is a limited one," *citing Endicott Johnson, supra*), *aff'd* 635 F.2d 1132 (5th Cir. January 15, 1981) (en banc), *cert. den.* —— U.S. ——, —— S. Ct. ——, No. 80-1740 (July 2, 1981); *Federal Election Commission* v. *Florida for Kennedy Committee*, 492 F. Supp. 587, 591 (S.D. Fla. 1980), *appeal pending* No. 80-6013 (5th Cir.); *Federal Election Commission* v. *Wisconsin Democrats for Change*, No. 80-C-124 at 2.[12] *But*

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[12] *See also Securities and Exchange Commission* v. *Dresser Industries, Inc.*, 628 F.2d 1368, 1380 n.28 (D.C. Cir. 1980) (en banc), *cert. den.* —— U.S. ——, 101 S.Ct. 529 (Nov. 17, 1980); *Federal Trade Commission* v. *Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 973, 974 (D.C. Cir. 1980); *Federal Trade Commission* v. *Anderson*, 631 F.2d 741, 744-745 (D.C. Cir. 1979); *Securities and Exchange Commission* v. *Arthur Young & Co.*, 584 F.2d 1018, 1024 (D.C. Cir. 1978), *cert. den.* 439 U.S. 1071 (1978); *Federal Trade Commission* v. *Texaco, Inc.*, 555 F.2d 862, 873 (D.C. Cir. 1977) (en banc), *cert. den.* 431 U.S. 974 (1977); *Securities and Exchange Commission* v. *Howatt*, 525 F.2d 226, 229, 230 (1st Cir. 1975); *Securities and Exchange Commission* v. *Brigadoon Scotch Distributing Co.*, 480 F.2d 1047, 1052, 1053 (2d Cir. 1973), *cert. den.* 415 U.S. 915 (1974); *Securities and Exchange Commission* v. *Wall Street Transcript Corp.*, 422 F.2d 1371, 1375

see Reader's Digest Association, Inc v. *Federal Election Commission*, 509 F. Supp. 1210, 1217 (S.D.N.Y. March 19, 1981); *Federal Election Commission* v. *Phillips Publishing, Inc.*, —— F. Supp. ——, 2 Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9156 (D.D.C. July 16, 1981). Relying on this precise standard, the district court enforced the FEC subpoenas issued to MNPL and CDA.

The court of appeals, however, rejected the *Morton Salt* standard as applicable only to agencies which regulate corporate and commercial matters and adopted a new substantially different "extra-careful scrutiny" standard for enforcement of FEC subpoenas. Thus, the court found it necessary to reach substantial jurisdictional issues at this early stage

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(2d Cir. 1970), *cert. den.* 398 U.S. 958 (1970); *United States* v. *Westinghouse Electric Corp.*, 638 F.2d 570, 574 (3d Cir. 1980); *Interstate Commerce Commission* v. *Gould*, 629 F.2d 847, 851 (3d Cir. 1980), *cert. den.* —— U.S. ——, 101 S.Ct. 856 (1980); *Federal Election Commission* v. *Lance, supra; Federal Trade Commission* v. *Turner*, 609 F.2d 743, 744 (5th Cir. 1980); *Federal Trade Commission* v. *Winters National Bank and Trust Co.*, 601 F.2d 395, 398 (6th Cir. 1979); *United States* v. *DiFonzo*, 603 F.2d 1260, 1265 (7th Cir. 1979), *cert. den.* 444 U.S. 1018 (1980); *Securities and Exchange Commission* v. *Savage*, 513 F.2d 188, 189 (7th Cir. 1975); *Adams* v. *Federal Trade Commission*, 296 F.2d 861, 866 (8th Cir. 1961) *cert. den.* 369 U.S. 864 (1962); *National Labor Relations Board* v. *International Medication Systems, Ltd.*, 640 F.2d 1110, 1114 (9th Cir. April 2, 1981); *Lynn* v. *Biderman*, 536 F.2d 820 (9th Cir. 1976), *cert. den.* 429 U.S. 920 (1976); *Federal Maritime Commission* v. *Port of Seattle*, 521 F.2d 431, 434-435 (9th Cir. 1975); *Crafts* v. *Federal Trade Commission*, 244 F.2d 882 (9th Cir. 1957), *rev'd* 355 U.S. 9 (1957); *Securities and Exchange Commission* v. *Blackfoot Bituminous, Inc.*, 622 F.2d 512, 514 (10th Cir. 1980), *cert. den.* —— U.S. ——, 101 S.Ct. 362 (Nov. 3, 1980); *Equal Employment Opportunity Commission* v. *University of New Mexico*, 504 F.2d 1296, 1302 (10th Cir. 1974).

because of the delicate nature of the materials subpoenaed,[13] the Commission's narrow investigatory authority,[14] and the Commission's "novel extension" of its jurisdiction. App. A at 13a-15a. Applying this

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[13] If the judgments of the court of appeals remain as precedent, the Commission will be required to establish conclusively its jurisdiction and coverage of the Act without benefit of adequate information, and to "answer at the outset of its investigation the possibly doubtful questions of fact and law that the investigation is designed and authorized to illuminate." *Federal Trade Commission* v. *Texaco*, 555 F.2d at 879 *quoting Securities and Exchange Commission* v. *Savage*, 513 F.2d 188, 189 (7th Cir. 1975). *See Federal Maritime Commission* v. *Port of Seattle*, 521 F.2d at 434; B. Schwartz, *Administrative Law*, at 116 (1976). Such a requirement will frustrate the Commission's attempt to investigate expeditiously alleged violations of the Act as mandated by Congress and will unduly delay Commission investigations, in direct violation of 2 U.S.C. § 437d (a)(9). *Oklahoma Press*, 327 U.S. at 213; *Federal Trade Commission* v. *Anderson*, 631 F.2d at 744-745.

[14] The Commission, however, was created by Congress as an agency with "broad investigatory, administrative and supervisory powers," 120 Cong. Rec. 34,397 (1974). Congress determined that the Commission must be authorized to investigate a violation if, "based on information obtained in the normal course of carrying out its duties under the Act", it found reason to believe a violation has occurred. H.R. Rep. No. 94-1057, 94th Cong. 2d Sess. at 1049-50 (1976). Indeed, the Commission has exclusive authority "to administer, seek to obtain compliance with and formulate policy with respect to [FECA]," 2 U.S.C. § 437c(b)(1), and exclusive jurisdiction with respect to civil enforcement of the Act. 2 U.S.C. § 437d(e), 437g(a); *In re Carter-Mondale Reelection Committee*, 642 F.2d 538, 545 n.9 (D.C. Cir. 1980); *Common Cause et al.* v. *Schmitt, et al*, 512 F. Supp. 489, 501, 503 (D.D.C. Sept. 30, 1980), *prob. juris. noted* No. 80-1067 (Feb. 23, 1981); 122 Cong. Rec. 12,203 (1976). *See also Committee to Elect Lyndon LaRouche* v. *Federal Election Commission*, 613 F.2d 834, 853-861 (D.C. Cir. 1979), *cert. den.* 444 U.S. 1074 (1980).

new and dramatically different standard, the appellate court reversed the district court's Orders. The necessary result of the court's judgments will be undue delays in the Commission's investigation of alleged violations of FECA in direct conflict with the statute's mandate for expeditious investigations. 2 U.S.C. §§ 437d, 437g; *CMA* v. *FEC*, 101 S.Ct. at 2726, 2727. The courts, rather than the Commission, will in the first instance and without benefit of the facts,[15] determine whether the FEC has subject matter jurisdiction, whether a violation of the Act has occurred, or whether the FEC, if it is allowed to conduct an investigation, will find a violation of FECA.[16] Every enforcement action in which

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[15] This Court found, more than 30 years ago, that the "very purpose of the subpoena . . . is to discover and procure evidence. . . ." *Oklahoma Press*, 327 U.S. at 201. Indeed, when first amendment challenges were raised as defenses to a subpoena, the Court held that "[i]t is enough that the investigation be for a lawfully authorized purpose, within the power of Congress to command." *Oklahoma Press*, 327 U.S. at 209. *See Securities and Exchange Commission* v. *Wall Street Transcript Co., supra. See also Zurcher* v. *Stanford Daily*, 436 U.S. 547, 566 (1978). Thus, the appellate court's decision to establish a new standard for judicial review of agency subpoenas is a marked departure from the long held rule set forth by this Court and other federal courts that statutory coverage is improperly and prematurely considered at the subpoena enforcement stage of administrative proceedings. *Oklahoma Press, supra; Federal Trade Commission* v. *Texaco*, 555 F.2d at 879.

[16] The district court's recent judgment in *Federal Election Commission* v. *Phillips Publishing Inc., supra*, which relies heavily on *MNPL* v. *FEC*, exemplifies the effect of the judgments on the Commission's attempt to administer and enforce the Act. ¶ 9156 at 51,224-51,226. Concluding that it was unlikely that the Commission would find a violation of FECA if

the FEC finds reason to believe that a violation has occurred, even those which could have been settled through conciliation, will be reviewed and fully litigated in the courts.[17] Indeed, the Commission, if it were allowed to proceed with its investigation, could determine that FECA does not cover the activities in question, closing its file on the matter without requiring judicial resolution of the underlying substantive issues.

By the court's judgments, the enforcement mechanism which serves to facilitate conciliation and to reduce the number of cases reaching litigation, may well be replaced by court action. Congress certainly did not intend such a result when it drafted FECA's enforcement procedures and created the Commission with the exclusive jurisdiction over civil enforcement of the Act. The court of appeals' judgments in *MNPL* v. *FEC* and *CDA* v. *FEC* are contrary to this Court's decisions on the role of the judiciary in administrative subpoena enforcement proceedings and should be reversed. *Hannah* v. *Larche, supra; Oklahoma Press, supra* and *Endicott Johnson, supra.*

In sum, the appellate court's decision will result in undue delays in Commission investigations of alleged violations of FECA and potential circumvention of FECA's contribution limitations found constitutional by this Court in *Buckley, supra* and *CMA*

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it were allowed to proceed with the investigation, the Court enjoined any further investigation and refused to enforce the Commission's subpoena. ¶ 9156 at 51,227.

[17] This Court has held, however, that agency findings of reason to believe are not final agency action to be reviewed by the courts. *Federal Trade Commission* v. *Standard Oil Company of California,* —— U.S. ——, 101 S.Ct. 488 (Dec. 15, 1980).

v. *FEC*, *supra*. Further, the appellate court's approach is a serious deviation from established subpoena enforcement case law which directly contradicts Congressional intent and the Commission's consistent interpretation of the statutory language. The lower court's judgments require review, consideration and reversal by this Court.

CONCLUSION

The judgments of the United States Court of Appeals for the District of Columbia Circuit frustrate the intent of Congress to regulate federal elections, apply a construction of FECA which is inconsistent with Congressional intent and with Commission interpretation, and conflict with precedent established by this Court and by the courts of appeals. A writ of *certiorari* should issue to review and reverse the judgments in these cases.

Respectfully submitted,

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AUGUST 14, 1981

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1136

FEDERAL ELECTION COMMISSION

v.

MACHINISTS NON-PARTISAN POLITICAL LEAGUE, APPELLANT

Appeal from the United States District Court for the District of Columbia

(D.C. Misc. No. 79-0291)

Argued January 12, 1981

Decided May 19, 1981

Joseph L. Rauh, Jr., with whom *John Silard* and *Judy Lyons Wolf* were on the brief, for appellant.

Miriam Aguiar, Attorney, Federal Election Commission with whom *Charles N. Steele*, General Counsel and *Kathleen I. Perkins*, Assistant General Counsel, Federal Election Commission were on the brief for appellee. *Lawrence M. Noble* and *Marsha G. Gentner*, Attorneys, Federal Election Commission also entered appearances for respondent.

Before: TAMM and WALD, *Circuit Judges* and HAROLD GREENE *, *United States District Judge* for the District of Columbia.

Opinion for the Court filed by *Circuit Judge* WALD.

WALD, *Circuit Judge*: The Machinists Non-Partisan Political League ("MNPL") appeals from a district court order which enforced a subpoena issued to MNPL by the Federal Election Commission ("FEC" or "Commission"). The subpoena was part of an FEC investigation into the activities of nine so-called "draft-Kennedy" organizations which operated during the first ten months of 1979. We hold that FEC's subpoena exceeded the Commission's subject matter jurisdiction, and therefore vacate the enforcement order.

I. FACTS AND PROCEEDINGS BELOW

MNPL is the political arm of the International Association of Machinists ("IAM"), and is registered as a "multi-candidate political committee" under the Federal Election Campaign Act, 2 U.S.C. § 431 *et seq.* ("FECA").[1] MNPL and the IAM had supported the election of Jimmy Carter in 1976, but thereafter became disenchanted with various of his policies deemed antithetical to the interests of the IAM membership.[2]

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

[1] All references to FECA in this opinion—unless otherwise indicated—are to the provisions operative prior to the Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (January 8, 1980).

[2] On September 8, 1978, IAM President Winpisinger delivered a major address in which he declared:

> President Carter has abandoned his constituency, his party's platform, and his own campaign pledges. Carter

By February, 1979 MNPL had begun encouraging and assisting the formation of "draft-Kennedy" groups in several states—including Iowa, Illinois and Florida—all engaged in promoting the acceptance of presidential candidacy by Senator Edward Kennedy. Between May, 1979 and November 7, 1979 when Senator Kennedy formally announced his candidacy for President, MNPL gave, by its own admission, approximately $30,000 to "draft-Kennedy" groups in seven states. Brief for MNPL at 7-8.[3]

On October 4, 1979 the FEC received a complaint from the Carter-Mondale Presidential Committee,

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> may be the best Republican President since Herbert Hoover. Look at his record.
>
> . . .
>
> President Carter—to me—is through. He is a weak, vascillating and ineffective President. I know as well as anyone, that those are dangerous words.

MNPL Brief at 6-7.

[3] The court is aware that the complaints and the Oldaker "reason to believe" notice discussed in the text, immediately *infra*, may qualify for protection from disclosure under 2 U.S.C. § 437g(a)(12), and under the Commission's regulations, 11 C.F.R. § 111.21 (1980). We need not decide in this case whether these provisions properly apply to disclosure by the courts, since neither party has raised this issue. On the contrary, both MNPL and the FEC have constructively waived any legal interest they may have in the confidentiality of these documents by discussing them in detail in their publicly available briefs to this court. *See* MNPL Brief at 17-8; FEC Brief at 3-5. Furthermore, nothing in our discussion reveals any facts beyond those the parties themselves have discussed in public, and we deem it essential in this case to outline the contents of the complaint, and the Commission's basis for its investigation (the "reason to believe" notice), in order that our holding on the limits of FEC's jurisdiction may be properly understood.

Inc., alleging that nine "draft-Kennedy" organizations were in violation of certain provisions of FECA. Specifically, the complaint alleged (1) that the "draft-Kennedy" groups were "political committee[s]" as that term is defined by FECA, 2 U.S.C. § 431(d); (2) that the nine named draft committees were affiliated within the meaning of 2 U.S.C. § 441a(a)(5), 11 C.F.R. § 110.3(a)(1)(ii)(D), and therefore all were subject to a single $5,000 contribution limitation, 2 U.S.C. § 441a(a)(1)(C), (a)(2)(C); and (3) that MNPL had exceeded this contribution limitation, thereby violating 2 U.S.C. § 441a(a)(2)(C). The complaint *expressly* declined to take any position on whether Senator Kennedy had become a "candidate" for purposes of the Act, Complaint at 11, and acknowledged that Kennedy had formally disavowed the various "draft-Kennedy" organizations, *id.* at 27.

Based on this complaint, FEC notified MNPL on October 19, 1979, that it had "found reason to believe" that

> by contributing, in the aggregate, in excess of $5,000 in a calendar year to the Florida for Kennedy Committee, New Hampshire Democrats for Change, Committee for Alternatives to Democratic Presidential Candidate, and Illinois Citizens for Kennedy, MNPL may have violated 2 U.S.C. § 441a(a)(2)(C). The Commission has determined that these four committees, among others, may be affiliated within the meaning of the Act and the Commission's regulations and that, if affiliated, contributions to them must be aggregated for purposes of the limitations set forth in 2 U.S.C. § 441a(a)(2)(C).

Letter from William C. Oldaker, General Counsel, FEC, to Howard F. Dow, Secretary-Treasurer, MNPL (October 19, 1979).

On November 2, 1979, the Carter-Mondale Presidential Committee submitted an amendment to its complaint asking that

> Senator Kennedy be found to be a candidate under 2 U.S.C. § 431(b)(2) as of no later than September 1, 1979; . . . and that all contributions made by . . . multi-candidate political committees in excess of $5,000—to the Florida, New Hampshire and any other affiliated draft-Kennedy committees on or after September 1, 1979, be found in violation of the limitations of 2 U.S.C. § 441a(a) . . ..

Amended Complaint at 3. Significantly, both the original complaint and the amended complaint focused exclusively on the nine respondents' "draft-Kennedy" activities, not on any other political, candidate-support activities in which they may have engaged.[4]

On November 5, 1979, the Commission issued a sweeping subpoena to MNPL, ordering production of, *inter alia*, all documents and materials relating to communications between MNPL and other "draft-

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[4] In fact throughout this litigation the Commission has insisted that its interest lies only with the "draft-Kennedy" aspects of the named groups' activities, and not with any of their other political, candidate-support activities. *See* Trial Transcript at 7-8 (statement by FEC counsel that the subpoena "does not involve any of the other activities in the Machinists Non-Partisan Political League, which is a multi-candidate political committee, and it does not go to any activities in the Machinists Non-Partisan League that does not deal with the so-called draft-Kennedy movement").

Kennedy" groups. The Commission's subpoena further demanded

> All documents and materials (including but not limited to minutes, notes, memoranda, or records of telephone conversations) relating to meetings, discussions, correspondence, or other internal communications whereby the MNPL or any of its committees or sub-units determined to support or oppose any individual in any way for nomination or election to the office of President in 1980.

Joint Appendix (hereinafter "J.A.") at 4-7. *MNPL was also ordered to provide a list of every official, employee, staff member, and volunteer of the organization, along with their respective telephone numbers.* The Commission made no attempt to limit its subpoena to the period after September 1, during which the amended complaint alleged that Senator Kennedy was a candidate for President, or to material relevant to the alleged support of Senator Kennedy's candidacy. In fact the subpoena nowhere even refers to Senator Kennedy or his alleged candidacy, except in listing the official names of the "draft-Kennedy" groups.

Following denial by the Commission of MNPL's motion to quash the subpoena for lack of jurisdiction, the FEC filed a petition in district court to enforce its subpoena. At a hearing on the Commission's petition on January 28, 1980, the parties fully argued the issue of the Commission's subject matter jurisdiction over draft committees. In ordering MNPL to comply with the Commission's subpoena, *see* J.A. at 13-17, the court held that a subpoena enforcement proceeding is not the proper forum for deciding the

issue of the Commission's alleged lack of jurisdiction. Although the court twice emphasized that it was not deciding the "merits" of MNPL's jurisdictional argument, the court did specifically find that the "guidelines of enforceability" found in *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), were satisfied.

> [T]he requirements to be met are first that the inquiry must be made within the authority of the agency. I don't think there is any question but what this inquiry is within the authority of the Federal Elections [sic] Commission. It was just this type of matter that caused Congress to set the whole machinery in motion when it enacted the statute.

J.A. at 13-14.

The district court's order enforcing the Commission's subpoena raises two issues.[5] First, we must decide if, before enforcing this particular subpoena, the district court first should have determined whether subject matter jurisdiction existed for the Commission's investigation. We answer that question affirmatively. Accordingly, we must also examine the district court's finding that the investigation of these draft committees was without "any question . . . within the authority of the Federal Elections [sic] Commission." J.A. at 13. We find, contrary to the district court, that the Commission lacks subject matter jurisdiction over the draft group activities it sought to investigate through this subpoena.

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[5] Although counsel informs us at oral argument that depositions have been taken and documents submitted pursuant to FEC's subpoena, no question of mootness exists because the Commission's investigation into these draft groups still continues.

II. Standards for Judicial Enforcement of This FEC Subpoena

FECA declares that federal courts "may, . . . in case of refusal to obey a subpoena or order of the Commission . . ., issue an order requiring compliance[.]" 2 U.S.C. § 437d(b). This grant of permissive authority is similar to other statutes which also provide that courts "may" enforce administrative subpoenas.[6] Where the concerns of the subpoena-issuing agency are of a corporate or commercial character, the Supreme Court has made it abundantly clear that courts should deny enforcement only where there is "too much indefiniteness or breadth" in the items requested, or where the inquiry is not one which the requesting agency is lawfully authorized to make. *See Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 208-09 (1946). As the Court has pointed out,

> [w]hile they may and should have protection from unlawful demands made in the name of public investigation, corporations can claim no equality with individuals in the enjoyment of a right to privacy. They are endowed with public attributes. They have a collective impact upon society, from which they derive the privilege of acting as artificial entities. The Federal Government allows them the privilege of engaging in interstate commerce. Favors from government often carry with them an enhanced measure of regulation. Even if one were to regard the request for information in this case as caused

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[6] *See, e.g.*, 15 U.S.C. § 49 (FTC); 29 U.S.C. § 209 (Administrator, Fair Labor Standards Act).

> by nothing more than official curiosity, nevertheless law-enforcing agencies have a legitimate right to satisfy themselves that corporate behavior is consistent with the law and the public interest.
>
> Of course a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power. *But it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.*

United States v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950) (citations omitted) (emphasis supplied).

The *Morton Salt* rule has been applied by this court repeatedly in business contexts to limit the scope of issues which may be litigated in a subpoena enforcement proceeding. In so doing we have repeatedly shown our awareness that the " 'very backbone of an administrative agency's effectiveness in carrying out the congressionally mandated duties of industry regulation is the rapid exercise of the power to investigate . . ..' " *FTC* v. *Texaco, Inc.*, 555 F.2d 862, 872 (D.C. Cir.) (*en banc*), *cert. denied*, 431 U.S. 974 (1977) (*quoting FMC* v. *Port of Seattle*, 521 F.2d 431, 433 (9th Cir. 1975)). Usually, scrutiny under the *Morton Salt* standard results in routine subpoena enforcement when the information sought falls within the purview of the regulatory agency's authority. *See, e.g., FTC* v. *Carter*, 636 F.2d 781, 785-87 (D.C. Cir. 1980) (applying *Morton Salt* standard, and "conclud[ing] that the Commission has sufficient statutory authority to conduct the investigation it

has ordered and that the investigation is related to congressionally prescribed duties of the Commission"); *FTC* v. *Owens-Corning Fiberglas Corp.*, 626 F.2d 966, 974 (D.C. Cir. 1980); *FTC* v. *Anderson*, 631 F.2d 741, 745 (D.C. Cir. 1979); *SEC* v. *Arthur Young & Co.*, 584 F.2d 1018, 1023-24, 1032-33 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1071 (1979); *Appeal of FTC Line of Business Report Litigation*, 595 F.2d 685, 702-03 (D.C. Cir.), *cert. denied*, 439 U.S. 938 (1978) (all cases where *Morton Salt* rule was applied in corporate or commercial contexts). *See also CAB* v. *Deutsche Lufthansa Aktiengesellscraft*, 591 F.2d 951, 952 (D.C. Cir. 1979) ("In general, this court respects the doctrine that an agency has jurisdiction to determine the scope of its authority, in the first instance, and that such matters will not be determined in a proceeding to enforce a subpoena. This doctrine is subject to exceptions, as where there is a patent lack of jurisdiction, but we do not find those exceptions to be applicable to the instant case." (citations omitted)).

Even in business regulation cases, however, the Supreme Court has never sought to eviscerate the independent role which the federal courts play in subpoena enforcement proceedings. In *Oklahoma Press*, *supra*, for example, the Court sustained judicial enforcement of an administrator's subpoenas issued to various news publishing corporations for the purpose of investigating alleged violations of the Fair Labor Standards Act ("FLSA"). Although the Court held it was unnecessary for the administrator to prove that the newspapers were "covered" by the Act before securing enforcement of a subpoena to conduct his investigation, 327 U.S. at 216, the Court went out of its way to emphasize that

> There is no harrassment when the subpoena is issued and enforced according to law. The Administrator is authorized to enter and inspect, but the Act makes his right to do so subject in all cases to judicial supervision. Persons from whom he seeks relevant information are not required to submit to his demand, if in any respect it is unreasonable *or overreaches the authority Congress has given.* To it they may make "appropriate defense" surrounded by every safeguard of judicial restraint.

Id. at 217 (emphasis supplied). The Court pointed out various "important questions which the Administrator's position concedes the courts may decide," and stressed the lower courts' duty to examine these questions with care. "The issues of authority to conduct the investigation, relevancy of the materials sought, and breadth of the demand," the Court declared, "are neither minor nor ministerial matters." *Id.* at 216-17 & n.57. The Court also found significant "the discretionary power implied in the [FLSA] statute's use of the word 'may,' rather than 'shall,' . . . in authorizing the court to enforce the subpoenas." *Id.* at n.57; *compare* 2 U.S.C. § 437(d)(b) (FEC statute also uses the word "may," rather than "shall").

Other business regulation cases have recognized the duty of an enforcing court to assure itself that the subject matter of the investigation is within the statutory jurisdiction of the subpoena-issuing agency. *See, e.g., United States* v. *Morton Salt Co., supra,* 338 U.S. at 652; *FTC* v. *Carter, supra,* 636 F.2d at 785-87; *FTC* v. *Owens-Corning Fiberglas Corp., supra,* 626 F.2d at 974; *Appeal of FTC Line of Business Report Litigation, supra,* 595 F.2d at 702-03;

FTC v. *Texaco, Inc.*, *supra*, 555 F.2d at 872. The FEC does not, and could not, claim any exemption from similar judicial scrutiny of its subpoenas.

The subpoena in this case, however, possesses a number of characteristics which make it especially important for an enforcing court to exercise particular care in assuring itself that subject matter jurisdiction does exist.

First, this investigation into "draft-Kennedy" groups represents an unprecedented assertion of subject matter jurisdiction [7] for the FEC. The Commission has failed to show us a single prior instance where it sought to conduct an investigation based solely upon alleged jurisdiction over "draft candidate" groups. Only two courts have ever considered FEC requests to enforce subpoenas on this basis, and in both cases the respondents were "draft-Kennedy" groups named in the very same Carter-Mondale complaints which form the basis for this investigation. *FEC* v. *Wisconsin Democrats for Change in 1980*, Order No. 80-C-124 (W.D. Wisc. Apr. 24, 1980); *FEC* v. *Florida for Kennedy Committee*, 492 F.Supp. 587 (S.D. Fla. 1980).[8]

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[7] This case concerns the jurisdiction of the FEC over the subject matter of contribution limitations to draft groups. It does not concern whether these groups—some of whom have registered with the FEC as multi-candidate political committees—are subject to the Commission's jurisdiction for other purposes. Obviously the mere fact of registration cannot suffice as a jurisdictional basis for an FEC investigation into any or all activities of a registrant, any more than registration before the SEC can suffice as a legal basis for an SEC investigation into any or all of a corporate registrant's activities, *e.g.*, its equal employment or labor relations practices. *Cf.* FEC Brief at 21.

[8] In *Wisconsin Democrats*, the court recognized and addressed the issue of subject matter jurisdiction, and found

This novel extension of the Commission's investigative authority warrants extra-careful scrutiny from the court because the activities which the FEC normally investigates differ in terms of their constitutional significance from those which are of concern to other federal administrative agencies whose authority relates to the regulation of corporate, commercial, or labor activities. The FEC does not oversee fair dealings in commerce, or insure adequate corporate disclosures, or guarantee fair labor standards, all of which are areas where only the minimal limitations upon the commerce power are usually implicated.[9] The subject matter which the FEC oversees, in contrast, relates to the behavior of individuals and groups *only insofar as they act, speak and associate for political purposes. See* 2 U.S.C. §§ 431, 441a. The creation of such an agency raised weighty constitutional objections, and its authority to exercise control over an area where "unin-

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on the merits that "on its face, the subject matter of the subpoena . . . is within the authority of the agency, thus meeting the . . . *Morton Salt* test." Order at 4-5. On the other hand, in *Florida for Kennedy Committee*, the district court found that "[t]he authorities appear generally to support [the] proposition" that "a political committee can only be a group whose major purpose is the nomination or election of a candidate," but held that under *Oklahoma Press* it could not consider the issue of "coverage" at the subpoena enforcement stage. 492 F. Supp. at 595-96 & n.12.

[9] *See generally* North American Co. v. SEC, 327 U.S. 686 (1949); United States v. Darby, 312 U.S. 100 (1941); Electric Bond Co. v. SEC, 303 U.S. 419 (1938); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); Northern Securities Co. v. United States, 193 U.S. 197 (1904); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 193-95 (1824).

hibited, robust, and wide open" [10] activity is constitutionally protected was approved by the Supreme Court only after being meticulously scrutinized and substantially restricted. *See Buckley* v. *Valeo*, 424 U.S. 1 (1976). Thus the highly deferential attitude which courts usually apply to business related subpoena enforcement requests from agencies whose subject matter jurisdiction is unquestioned, has no place where political activity and association never before subject to bureaucratic scrutiny form the subject matter being investigated.

A second consideration making careful judicial scrutiny of jurisdiction necessary in this case is the obvious difference between the scope of investigatory authority vested in agencies such as the FTC,[11] SEC,[12] or the Administrator of the Department of Labor's Wage and Hour Division [13] on the one hand, and the FEC on the other. The former agencies are vested with broad duties to gather and compile information and to conduct periodic investigations concerning business practices. But the FEC has no such roving statutory functions. On the contrary, investigations such as the one conducted here may begin only if an individual first files a signed, sworn, notarized complaint with the Commission.[14] The

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[10] *Cf.* New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

[11] 15 U.S.C. § 46.

[12] 15 U.S.C. § 78u.

[13] 29 U.S.C. § 211.

[14] Any person who believes a violation of this Act or of chapter 95 or chapter 96 of title 26 has occurred may file a complaint with the Commission. Such complaint shall

Commission's duty thereafter is "expeditiously" to conduct a confidential investigation of the complaint. 2 U.S.C. § 437g(a)(3). Plainly, mere "official curiosity" will not suffice as the basis for FEC investigations,[15] as it might in others. *Cf. United States* v. *Morton Salt Co., supra*, 338 U.S. at 652 (FTC subpoena enforcement proceeding).

The third, and most important reason for heightened judicial concern over the absence of jurisdiction is the delicate nature of the materials demanded in this broad subpoena. As already described, the subject matter of these materials represents the very heart of the organism which the first amendment was intended to nurture and protect: political expression and association concerning federal elections and officeholding. The FEC first demands *all* available materials which concern a certain political group's "internal communications," wherein its decisions "to support or oppose any individual in any

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be in writing, shall be signed and sworn to by the person filing such complaint, and shall be notarized. . . . The Commission may not conduct any investigation under this section, or take any other action under this section, solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

2 U.S.C. § 437g(a)(1).

[15] It is noteworthy in this regard that the 1979 Amendments to FECA abolished the "random" auditing authority which the FEC previously possessed under 2 U.S.C. § 438(a)(8). *See* 2 U.S.C. § 438(b) (Supp. III 1980); Pub. L. No. 96-187, § 109 (1980); 125 *Cong. Rec.* H12366 (daily ed. Dec. 20, 1979) (remarks of Rep. Thompson). *But see* 2 U.S.C. § 437g(a)(2) (Supp. III 1980) (FEC may make "reason to believe" finding on basis of "information ascertained in the normal course of carrying out its supervisory responsibilities").

way for nomination or election to the office of President in 1980" are revealed. J.A. at 4-7. Then this federal agency, whose members are nominated by the President, demands *all* materials concerning communications among various groups whose alleged purpose was to defeat the President by encouraging a popular figure from within his party to run against him. As a final measure, the FEC demands a listing of every official, employee, staff member and volunteer of the group, along with their respective telephone numbers, without any limitation on when or to what extent those listed participated in any MNPL activities. The government thus becomes privy to knowledge concerning which of its citizens is a "volunteer" for a group trying to defeat the President at the polls. This information is of a fundamentally different constitutional character from the commercial or financial data which forms the bread and butter of SEC or FTC investigations,[16] since release of such information to the government carries with it a real potential for chilling the free exercise of political speech and association guarded by the first amendment.[17]

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[16] *Cf.* SEC v. McGoff, No. 79-2484, slip op. at 8-10 (D.C. Cir. Feb. 3, 1981) (in enforcing an SEC subpoena to a newspaper publisher and writer, "an accommodation was required to avoid unnecessary encroachment upon [the publisher's] activities and associations . . .").

[17] One can only imagine what the Founding Fathers would have thought of a federal bureaucracy demanding comprehensive reports on the internal workings and membership lists of peaceful political groups. It bears remembering that Elbridge Gerry, Oliver Ellsworth, Roger Sherman, Spencer Roane, Noah Webster, James Iredell, and others all sought anonymity while they conducted the most important political campaign of *their* lives, the campaign to ratify the federal

Current first amendment jurisprudence makes clear that before a state or federal body can compel

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constitution. *See Pamphlets on the Constitution of the United States* (P. Ford, ed., DeCapo Press reprint 1968); *Essays on the Constitution of the United States* (P. Ford, ed., reprint 1970). In fact, the *Federalist Papers*—"the most important work in political science that has ever been written, or is likely ever to be written, in the United States"—was published anonymously by its authors, Hamilton, Madison, and Jay. *The Federalist Papers* at vii (Mentor ed. 1961) (intro. by Clinton Rossiter).

Fear and resentment of royal, administrative control over politics generally, and elections particularly, was a key element in the opposition political culture of England during the eighteenth century, a culture which permeated political thinking in the American colonies. *See* B. Bailyn, *The Origins of American Politics* 30, 52-3, 56-7 (1968). Indeed free popular elections represented one of the foundations of republican government for Jefferson and his colleagues: "Action by the citizens in person in affairs within their reach and competence, and in all others by representatives, chosen immediately, and removable by themselves, constitutes the essence of a republic[.]" 10 *The Writings of Thomas Jefferson* 24 (P. Ford, ed. 1899) (letter from Jefferson to DuPont de Nemours). If popular elections formed the essence of republican government, free discourse and political activity formed the prerequisite for popular elections. As Madison wrote, a government which is "elective, limited and responsible" to the people requires "a greater freedom of animadversion" than one not so structured. Madison's Report on the Virginia Resolutions of December 21, 1798, *in* 4 *Elliot's Debates* 546, 570, 574-75 (1836).

In our day, the Supreme Court has recognized that "debate on the qualifications of candidates [is] integral to the operation of the system of government established by our Constitution." Buckley v. Valeo, 424 U.S. 1, 14 (1976). Because the electoral process plays so central a role in our conception of a free government, "it can hardly be doubted that the constitutional guarantee [of the first amend-

disclosure of information which would trespass upon first amendment freedoms, a "subordinating interest of the State" must be proffered, and it must be "compelling." *NAACP* v. *Alabama*, 357 U.S. 449, 463 (1958) (*quoting Sweezy* v. *New Hampshire*, 354 U.S. 234, 265 (1957) (Frankfurter, J., concurring)).[18] The Supreme Court has warned that

> It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication of ideas . . ..

Sweezy v. *New Hampshire*, *supra*, 354 U.S. at 245.

In particular, the FEC's demand for a list of all members and volunteers of this political group implicates the rigorously protected first amendment interest in privacy of political association.

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ment] has its fullest and most urgent application precisely to the conduct of campaigns for political office." Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971). We therefore would be remiss if we failed to give the most careful scrutiny to this unprecedented FEC investigation.

[18] *See* Bates v. Little Rock, 361 U.S. 516, 524 (1960); Common Cause v. Schmitt, CA 80-1609, memorandum op. at 8 (D.D.C. Sept. 30, 1980) (three-judge court), *probable jurisdiction noted*, 49 U.S.L.W. 3616 (S. Ct. Feb. 23, 1981) ("Following *Buckley*, then, it is plain that election laws regulating political expression require a demonstration of 'compelling governmental interest' to withstand a constitutional challenge calling for 'strict scrutiny' by a reviewing court").

> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association . . .. This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . Inviolability of privacy in group association may in many circumstances be indispensible to preservation of freedom of association . . ..

NAACP v. *Alabama*, *supra*, 357 U.S. at 462. *See also Bates* v. *Little Rock*, *supra*, 361 U.S. at 523.

We do not here demand of the FEC that it show a compelling interest before it may obtain the information it seeks. Instead, we may assume *arguendo* that if the FEC has statutory jurisdiction to conduct this investigation, then a compelling interest for the subpoenaed information can be shown. But if, on the other hand, the FEC lacks jurisdiction to enforce contribution limitations on "draft" groups, then no compelling interest for the subpoenaed information can possibly exist. The highly sensitive character of the information sought simply makes it all the more important that the court be convinced that jurisdiction exists to conduct this investigation before it enforces subpoenas issued pursuant thereto.

A final factor which causes us to carefully examine jurisdiction at this stage is that the Commission's assertion of jurisdiction here rests solely upon a legal interpretation of the statute which does not depend upon any facts sought to be gleaned through the subpoena.[19] The Commission has already deter-

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[19] In the Seventh Circuit, it is well-settled that the *Oklahoma Press* rule restricting litigation of jurisdictional issues

mined that Senator Kennedy was *not* a candidate for President as of August 17, 1979, but it nevertheless asserts that "draft-Kennedy" activities both before and after that date are controlled by FECA's reporting and contribution provisions. FEC Advisory Opinion 1979-40 (Aug. 17, 1979). *See also* FEC Advisory Opinion 1979-49 (Oct. 5, 1979). No matter what facts it finds through this investigation, the requisite jurisdiction for the investigation itself must stand or fall on the purely legal claim that "draft" groups are "political committees" under FECA. The Commission does seek additional facts regarding the affiliation question,[20] but this will not alter the Commission's legal assertion concerning jurisdiction over draft groups.

After reviewing these particular characteristics of the FEC subpoena, we conclude that where the Commission seeks judicial enforcement of a sweeping subpoena, issued pursuant to an unprecedented investigation which intrudes upon centrally impor-

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in subpoena enforcement proceedings will be relaxed where "the issue involved is a strictly legal one not involving the agency's expertise or any factual determinations." FTC v. Miller, 549 F.2d 452, 460 (7th Cir. 1977); *see* FTC v. Feldman, 532 F.2d 1092, 1096 (7th Cir. 1976); Jewel Cos. v. FTC, 432 F.2d 1155, 1159-60 (7th Cir. 1970). *Cf.* FTC v. Ernstthal, 607 F.2d 488, 491 & n.5 (D.C. Cir. 1979) (applying the *Miller* rule *arguendo*, but reserving the question whether this Circuit has formally adopted it). *See generally* text at note 32 *infra*.

[20] Apparently, the Commission issued its subpoena for the purpose of obtaining information concerning alleged affiliations among the draft groups. "We are not asking for all the documents in connection with all of MNPL's political activities. We are simply requesting documents to either substantiate or refute the alleged affiliation question [sic]." FEC Counsel at Oral Argument.

tant first amendment associational and advocacy interests, and where the FEC's assertion of jurisdiction to conduct the investigation rests solely upon a legal interpretation of a statute without any need for additional facts, then it is essential for a court to assure itself affirmatively that the investigation is within the subject matter jurisdiction of the Commission before lending its authority to enforcement of a subpoena.

III. FEC Jurisdiction Over "Draft Candidate" Groups

The sole proferred jurisdictional basis for this FEC subpoena is a complaint alleging that MNPL's contributions to various "draft-Kennedy" groups in excess of $5,000 violated the contribution limitations of FECA. *See* pp. 3-5 *supra*. The Act provides that "[n]o multicandidate political committee shall make contributions—. . . to any other political committee in any calendar year which, in the aggregate, exceed $5,000." 2 U.S.C. § 411a(2).[21] MNPL argues that none of the groups to which it gave contributions were "political committee[s]" for purposes of this contribution limitation, and that therefore the FEC lacks subject matter jurisdiction to conduct its in-

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[21] The statute also provides:

> No candidate or political committee shall knowingly accept any contribution or make any expenditure in violation of the provisions of this section. No officer or employee of a political committee shall knowingly accept a *contribution made for the benefit or use of a candidate*, or knowingly make any *expenditure on behalf of a candidate*, in violation of any limitation imposed on contributions and expenditures under this section.

2 U.S.C. § 441a(f) (emphasis supplied).

vestigation. The FEC, taking the opposite view, asserts that the "draft-Kennedy" groups are "political committee[s]." The Act defines the operative terms as follows:

> "political committee" means any committee, club, association, or other group of persons which receives contributions or makes expenditures during a calendar year in the aggregate amount exceeding $1,000;
>
> "contribution"—
>
> (1) means a gift, subscription, loan, advance, or deposit of money or anything of value made for the purpose of—
>
> (A) influencing the nomination for election, or election, of any person to Federal office or for the purpose of influencing the results of a primary held for the selection of delegates to a national nominating convention of a political party, or
>
> (B) influencing the results of an election held for the expression of a preference for the nomination of persons for election to the office of President of the United States;
>
> . . .
>
> "expenditure"—
>
> (1) means a purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made for the purpose of—
>
> (A) influencing the nomination for election, or the election, of any person to Federal office, or to the office of presidential and vice-presidential elector; or

> (B) influencing the results of a primary election held for the selection of delegates to a national nominating convention of a political party or for the expression of a preference for the nomination of persons for election to the office of President of the United States[.]

2 U.S.C. § 431(d), (e), (f).

On its face, the statute might seem to include as political committees not only "draft candidate" groups like the ones in this case, but also issue-oriented groups, lobbying organizations, religious bodies, and communal associations of all sorts.[22] In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), however, the Supreme Court explicitly recognized the potentially vague and overbroad character of the "political committee" definition in the context of FECA's disclosure requirements, and limited it appropriately.

> The general requirement that "political committees" and candidates disclose their expenditures could raise similar vagueness problems, for "political committee" is defined only in terms of amount of annual "contributions" and "expenditures," and could be interpreted to reach groups engaged purely in issue discussion. *The lower courts have construed the words "political committee" more narrowly. To fulfill the purposes*

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[22] *Cf.* United States v. National Committee for Impeachment, 469 F.2d 1135, 1142 (2d Cir. 1972) ("[o]n the Government's thesis every little Audubon Society chapter would be a 'political committee,' for 'environment' is an issue in one campaign after another. On this basis, too, a Boy Scout troop advertising for membership to combat 'juvenile delinquency' or a Golden Age Club promoting 'senior citizens' rights' would fall under the Act").

> *of the Act they need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate. Expenditures of candidates and of "political committees" so construed can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign related.*

424 U.S. at 79 (footnotes omitted) (emphasis supplied).[23]

The *Buckley* Court felt that a more expansive definition of "political committee" would have been constitutionally dangerous, since once any group of Americans is found to be a "political committee" it must then submit to an elaborate panoply of FEC regulations requiring the filing of dozens of forms, the disclosing of various activities, and the limiting of the group's freedom of political action to make

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[23] The Supreme Court went on to confine the definition of "expenditure" for purposes of the disclosure provision, section 434:

> [W]hen the maker of the expenditure is not within these categories—when it is an individual other than a candidate or a group other than a "political committee"—the relation of the information sought to the purposes of the Act may be too remote. To ensure that the reach of § 434(e) is not impermissibly broad, we construe "expenditure" for purposes of that section in the same way we construe the terms of § 608(e)—to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate.

424 U.S. at 79-80 (footnotes omitted).

expenditures or contributions. The Court declared that such limitations "operate in an area of the most fundamental First Amendment activities." 424 U.S. at 14. Specifically, the Court found only one "constitutionally sufficient justification" which would enable the contribution limitations of FECA to survive: "to limit the actuality and appearance of corruption resulting from large individual financial contributions" to candidates. *Id.* at 12-28. *See also Common Cause* v. *Schmitt, supra,* memorandum op. at 9. The Court made it clear that since the contribution limitations interfered with "fundamental First Amendment interests," *id.* at 23, the means chosen by Congress to promote this important goal had to be "closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* at 25. The Court found that FECA's limitation on contributions to candidates and their political committees was "focus[ed] precisely" on "the narrow aspect of political association where the *actuality and potential for corruption have been identified . . .*." *Id.* at 28 (emphasis supplied).

But where a group's activities are not related in any way to a person who has decided to become a candidate, the "actuality and potential for corruption" are far from having been "identified." Draft groups may vary widely in character, from those wishing to encourage a particular individual's entrance as a candidate, to those encouraging a whole field of possible candidates, all of whom meet the group's particular policy or personal qualifications. Draft groups do have one thing in common, however: they aim to produce some day a candidate acceptable to them, but they have not yet succeeded. Therefore none are promoting a "candidate" for of-

fice, as Congress uses that term in FECA.[24] The Supreme Court has found, however, that unless a group is "under the control of a candidate or [its] major purpose . . . is the nomination or election of a candidate," 424 U.S. at 79, it cannot constitute a "political committee" under the Act. "Political committee" was defined in this way by the Court for the purpose of "focusing precisely" FECA's broadly worded provisions on "the narrow aspect of political association" which could constitutionally be restricted, because its potential for corruption had been specifically identified by Congress. "Draft" groups, however, neither fall within the Court's limited definition of political committees, nor has their potential for corruption been specifically identified by Congress.

The narrowing construction given to the words "political committee" by the lower courts which was endorsed in *Buckley* appeared in *United States* v. *National Committee for Impeachment*, 469 F.2d 1135 (2d Cir. 1972); *ACLU, Inc.* v. *Jennings*, 366 F.

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[24] The term "candidate" is one specifically defined under FECA:

> "candidate" means an individual who seeks nomination for election, or election, to Federal office, whether or not such individual is elected, and, for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election, if he has (1) taken the action necessary under the law of a State to qualify himself for nomination for election, or election, to Federal office, or (2) received contributions or made expenditures, or has given his consent for any other person to receive contributions or make expenditures, with a view to bringing about his nomination for election, or election, to such office[.]

2 U.S.C. § 431(b).

Supp. 1041 (D.D.C. 1973) (three-judge court), *vacated as moot sub nom., Staats* v. *ACLU*, 422 U.S. 1030 (1975); and *Buckley* v. *Valeo*, 519 F.2d 821 (D.C. Cir. 1975) (*en banc*), *aff'd in part and rev'd in part*, 424 U.S. 1 (1976). "[I]n the candid service of avoiding serious constitutional doubt," [25] each of these courts attempted, as we shall attempt, to find a fair reading of the statute which comports with first amendment safeguards. All three of these decisions recognized the grave constitutional difficulties inherent in construing the term "political committee" to include groups whose activities are not under the control of a "candidate," or directly related to promoting or defeating a clearly identified "candidate" for federal office.

In *National Committee for Impeachment* a group opposed to the Vietnam War spent over $17,000 to purchase a newspaper advertisement which reprinted a resolution introduced in the House of Representatives calling for the impeachment of President Nixon. The advertisement was published in May of a Presidential election year. The Committee asserted in the advertisement that it would devote its resources to any candidate for election or reelection to the House of Representatives, regardless of party, in the order in which they indicated support for the impeachment resolution. The United States obtained an injunction in the district court requiring the purchasers of the advertisement to register as a "political committee" under FECA, arguing that the advertisement was purchased and "made for the purpose of influencing" the outcome of the 1972 Presidential race, 2 U.S.C. § 431, and that the purchasers had

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[25] United States v. Rumely, 345 U.S. 41, 47 (1953).

publicly promised to support various candidates for federal office. In reversing the trial court's decision, the Second Circuit looked first to the statutory definitions of "political committee" and "contribution," and to the appropriate legislative history. The court found the legislative history entirely unenlightening, 469 F.2d at 1139, but did conclude that "[t]he words of the Act themselves point toward some more definite connection between candidate and committee than was here involved." *Id.* The court then declared:

> We thus construe the words "made for the purpose of influencing" in [section 431(e) and (f)] to mean an expenditure made with the authorization or consent, express or implied, or under the control, direct or indirect, of a candidate or his agents. . . . We also construe the Act to apply only to committees soliciting contributions or making expenditures the major purpose of which is the nomination or election of candidates.

Id. at 1141.

The Second Circuit's interpretation of the words "political committee" was followed in *ACLU, Inc.* v. *Jennings, supra.* There plaintiffs sought declaratory and injunctive relief against enforcement of the disclosure provisions of FECA, alleging that the standards for determining when a group becomes a "political committee" under the Act were overbroad and vague, and imposed a chilling effect upon their exercise of first amendment freedoms since the provisions might be enforced against them. 366 F. Supp. at 1047, 1054-55. Recognizing the problem of overbreadth, the court adopted a "limited and narrow

construction" of the Act in order to "remove any chilling effects worked upon the plaintiffs as well as obviate the necessity of this Court having to invalidate the [disclosure] Title." *Id.* at 1056. The court stated its "full agreement" with the *National Committee* test, which required that there be a clear connection between expenditures or contributions and a "candidate" for federal office. *Id.* at 1057. "We are satisfied," the court said,

> that by so construing the reaches of [the disclosure sections of FECA] the fears of constitutional infringements expressed by plaintiffs will be eliminated. They and other groups concerned with the open discourse of views on prominent national issues may, under both this ruling and that of the Second Circuit, comfortably continue to exercise these rights and feel secure that by so doing their associational rights will not be encroached upon.

Id. The third and final case cited by the Supreme Court, this court's decision in *Buckley* v. *Valeo*, *supra*, also expressly approved the limiting interpretations given to the words "political committee" in *National Committee* and *Jennings*.[26]

We recognize that *National Committee* and *Jennings* concerned so-called non-partisan, issue-oriented groups, not so-called "draft" committees. We also understand that at the time the statute was written and amended in 1971, 1974, and 1976, "draft" groups were either unheard of, or else not considered as a factor of sufficient importance in the political

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[26] Buckley v. Valeo, *supra*, 519 F.2d at 863 n.112.

process to warrant concern by Congress.[27] But the question before us is not whether Congress specifically considered, and then exempted, "draft" groups from the contribution and disclosure requirements when it enacted and amended FECA; rather, the question is simply whether this statute—which nowhere mentions "draft" groups—should be read to imply coverage for such groups.[28]

In this delicate first amendment area, there is no imperative to stretch the statutory language, or read into it oblique inferences of Congressional intent to include "draft" groups. Achieving a reasonable, constitutionally sound conclusion in this case requires just the opposite. "It is our duty in the interpretation of federal statutes to reach a conclusion which

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[27] The Commission itself has stated, "obviously, Congress did not at that time [of the 1974 and 1976 Amendments to FECA] anticipate that draft committees would emerge as a phenomenon in the federal campaign process. Faced with such an aberration and with the task of determining how the statutory provisions should be applied under these circumstances, the court must resort to the process of projecting how the legislature would have dealt with this concrete situation had it been able to address it." FEC Memorandum in Reply to Respondent's Opposition, J.A. 18, 26.

[28] Where regulatory agencies are confronted with new circumstances that create problems which Congress has not yet considered, courts frequently decline to permit expansion of regulatory jurisdiction into the new area. *See* Chemehuevi Tribe of Indians v. FPC, 420 U.S. 395, 422-24 (1975) (technological developments occurring after enactment of a statute do not in themselves justify expansion of jurisdiction of an agency beyond the scope described by Congress); FPC v. Louisiana Power & Light Co., 406 U.S. 621, 635-36 (1972) (a newly arisen need for regulation cannot of its own force expand the reach of commission's jurisdiction).

will avoid serious doubt of their constitutionality." [29] Unless, therefore, Congress made reasonably clear its intent to bring "draft" groups—organizations whose contributions and expenditures do not relate to an identifiable "candidate"—under the contribution limitations of section 441a, we must decline to extend that provision to cover such groups so as to avoid the constitutional problems which *Buckley* and its lower court predecessors were able to avoid by narrowly construing the term "political committee."

In examining the legislative history, we find ourselves in agreement with the *National Committee* court that "Congress 'has voiced its wishes in muted strains and left it to the courts to discern the theme in the cacophony of political understanding.'" 469 F.2d at 1139. The legislative history of the term "political committee" is, in a word, uninformative, at least prior to 1979. But although not dispositive, we do find that the legislative history of the 1979 Amendments to FECA does shed some light on the question whether draft groups were, in 1979, considered by Congress to be subject to the contribution and disclosure provisions of the Act.

Prior to the 1979 Amendments, the reporting requirement of FECA mandated that "each treasurer of a political committee supporting a candidate or candidates for election to federal office . . . shall file with the Commission reports of receipts and expenditures on forms to be prescribed or approved by it."

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[29] Richmond Co. v. United States, 275 U.S. 331, 346 (1928). *See generally* United States v. Rumely, *supra*, 345 U.S. at 45, 47; NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937); Ashwander v. TVA, 297 U.S. 288, 341, 346-47 (1936) (Brandeis, J., concurring); Crowell v. Benson, 285 U.S. 22, 62 (1932).

2 U.S.C. § 434(a)(1). Effective January 8, 1980, however, the law was amended to delete any reference to "supporting a candidate or candidates for election to federal office," so that "draft" groups would be required to comply with the reporting requirement. The House Report on the FECA Amendments of 1979 stated

> Each treasurer of a political committee is required to file reports of receipts and disbursements. Under the current Act, only treasurers of a political committee supporting a candidate or candidates were required to file. The change was made to insure that organizations set up to "draft" individuals who are not actually candidates will be required to report.

H.R. Rep. No. 96-422, 96th Cong., 1st Sess. 15 (1979).

This change in the reporting requirements of FECA was the result of repeated efforts by the FEC to obtain jurisdiction over draft groups. As early as 1975 the Commission stated in its legislative recommendations:

> Thought should be given to *amending the law* to make the *contribution limitations* applicable to draft movements. Under the present law, an individual is not a *candidate* unless he takes the action necessary to get on the ballot, makes or raises, or authorizes a person to make or raise, contributions or expenditures on his behalf or takes affirmative action to become elected to federal office.

FEC 1975 Annual Report at 79 (emphasis supplied). This statement clearly indicates that the Commission

believed that "draft movements" were not covered by contribution limitations because they were not related to a "candidate," as that term is defined by statute: Again in 1976, the Commission stated:

> The Congress may wish to consider amending the Act to bring draft movements within the *reporting provisions* and *contribution limitations.*

FEC 1976 Annual Report at 74-5 (emphasis supplied). Similar statements were made by the FEC in its 1977 and 1978 reports.[30]

In 1979 Congress finally accepted the Commission's recommendation to require that "draft" groups file reports as political committees. The writers of the House report apparently believed that "draft" groups should be treated as political committees for some purposes, at least. But there is no indication from the 1979 Amendments or the legislative history that such "draft" groups were to be bound by the contribution limitations.[31] Certainly no such infer-

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[30] *See, e.g.*, FEC Legislative Recommendations, *in* Federal Election Reform Proposals of 1977, Hearings Before the Senate Committee on Rules and Administration, 95th Cong., 1st Sess. 1050, 1067 (1977) ("The Congress may wish to consider amending the Act to bring draft movements within the reporting provisions and contribution limitations").

[31] It would not have been unreasonable for Congress to require that "draft" groups report their activities, but not be bound by contribution or expenditure limitations. The *Buckley* opinion—which has informed much of the legislative debate over FECA since 1975—mentioned several times that FECA's disclosure provisions serve independent functions from the contribution and expenditure limits, among them, promoting more informed voting by providing the electorate with information about candidates' financial sup-

ence can be made regarding the state of the law prior to 1979. Indeed not even a whisper about limiting contributions to "draft" groups has ever been heard in the legislative history of FECA. It is therefore clear that Congress has never acted expressly to bring "draft" groups within the coverage of contribution limitations.

All of this—the absence of any indication that Congress affirmatively intended to make "draft" groups political committees for contribution purposes; the Commission's admission that prior to 1979 Congress never even faced the issue of "draft" groups; the Commission's repeated pleas to *amend* the law to make the contribution limits applicable; Congress' limited response to such pleas, which addressed only the reporting issue; and, finally, *Buckley's* judicial gloss limiting the definition of "political committees" which could constitutionally be regulated—compels us to conclude that the Commission lacked subject matter jurisdiction over allegations that groups seeking only to "draft" Senator Kennedy to become a "candidate" some time in the future have violated the contribution limitations of FECA. Whatever the post-1979 situation, it is clear to us that in this case the contribution limitations did not apply to the nine groups whose activities did not support an existing "candidate," but merely represented attempts to convince the voters—or Mr. Kennedy himself—that he would make a good "candidate," or should become a "candidate."

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porters. Buckley v. Valeo, *supra*, 424 U.S. at 76, 81, 83. Also, it could hardly have escaped Congressional notice that the appellants in *Buckley* did not even allege that the disclosure provisions—in contrast to the contribution and expenditure limits—were *per se* unconstitutional. *Id.* at 60.

IV. Conclusion

In order to insure that the Commission's investigations comport with the fundamental first amendment interest in guarding constitutionally protected information from unlawful disclosure, we believe that when a serious and novel question of the Commission's subject matter jurisdiction is presented, an essential prerequisite for enforcing an FEC subpoena is a determination by the district court that subject matter jurisdiction exists for the investigation. Since the FEC lacked jurisdiction to control "draft" group contributions, the subpoena should not have been enforced.

There may be cases, however, where the Commission asserts a need for additional factual information before a decision on the jurisdictional question can reasonably be made. *Cf.* text at note 19 *supra.* If the court so finds, then it may adopt a two-step procedure similar to one used in *Reader's Digest Ass'n* v. *FEC*,[32] a procedure designed to strike an

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[32] In Reader's Digest Ass'n v. FEC, 81 Civ. 596 (S.D.N.Y. Mar. 19, 1981), plaintiff, a magazine publisher, sued to enjoin the Commission from proceeding with an investigation into whether it had violated section 431 by making expenditures to disseminate to other media outlets videotapes of a computer reenactment of Senator Edward Kennedy's accident at Chappaquiddick. *Id.*, memorandum op. at 1. Reader's Digest claimed that it was exempt from FEC's jurisdiction pursuant to a statutory provision excluding certain activities from coverage under FECA, 2 U.S.C. § 431 (9) (B) (i). Although the court declined to enjoin the investigation because no subpoena had yet been issued, *id.* at 13, the court did express its concern over the authority of the Commission to conduct its investigation.

> [T]his dispute involves First Amendment considerations based on a recognition that freedom of the press is substantially eroded by investigation of the press, even if

appropriate balance between the need for effective investigations and the preservation of first amend-

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> legal action is not taken following the investigation. Those concerns are particularly acute where a governmental entity is investigating the press in connection with the dissemination of political matter. . . . Both the Constitution and the statutory exemption for press activities suggest that . . . judicial scrutiny [at] a later stage in the administrative process is not properly applicable to these circumstances. This is easily demonstrated in the context of a more extreme example:
>
> If a newspaper relying on a secret source were publishing a series of articles containing derogatory information about the incumbent President during his campaign for reelection, and the FEC undertook to investigate the newspaper asking among other questions the source of the information published, could it seriously be contended that an application by the newspaper for judicial intervention would be premature because of the preliminary stage of the FEC's proceedings? In my view the statute, in creating an exemption for the press in its news and opinion dissemination function, demands the FEC not even to investigate such circumstances and authorizes court intervention if the FEC oversteps the limitation.

Id. at 7-8.

Because factual questions existed regarding whether the Commission had statutory authority to conduct its investigation, the court adopted a two-step process to govern its continuation. In the first stage, the only investigation permitted would be for the purpose of determining whether jurisdiction existed, *i.e.*, to gather the facts helpful in deciding whether the statutory exemption properly applied to plaintiff. Only if the Commission found probable cause that the press exemption did *not* apply, would further investigation then be permitted into whether the substantive violation had occurred. *Id.* at 9-10. The court stated

> No explicit reference is to be found in the statute to this two-step process. It seems to me, however, to be the

ment liberties.[33] Initially, the court may enforce a subpoena limited to that information which will allow the FEC to ascertain whether it does or does not have jurisdiction. If jurisdiction for a full investigation appears to exist, a broader subpoena seeking evidence of a violation may then be enforceable.

In this case, for example, the FEC may now wish to proceed with its investigation on another jurisdictional basis, alleging, for example, that these pro-Kennedy groups were, or may have been, operating on behalf of *candidate* Kennedy. A subpoena requesting information about when Senator Kennedy actually became a candidate might, in such a case, be enforceable. If after this jurisdictional investigation the Commission can demonstrate subject matter jurisdiction by showing, for example, that Senator Kennedy was a "candidate" after August 17, 1979, then a second, broader, subpoena may follow.

But a sweeping demand by the FEC for membership lists and internal communications of a political group over which no showing of jurisdiction has been made cannot now be approved by this court without ignoring vitally important constitutional freedoms by which Americans conduct their political affairs. The district court's order is therefore vacated, and the matter is remanded for further proceedings consistent with this opinion.

Order vacated; case remanded.

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necessary accommodation between, on the one hand, the Commission's duty to investigate possible violations and, on the other, the statutory exemption for the press combined with a First Amendment distaste for government investigations of press functions.

Id. at 10.

[33] *Cf.* SEC v. McGoff, *supra* note 16.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1256

FEDERAL ELECTION COMMISSION

v.

CITIZENS FOR DEMOCRATIC ALTERNATIVES IN 1980, APPELLANT

Appeal from the United States District Court for the District of Columbia

(D.C. Misc. No. 80-0009)

Argued January 12, 1981

Decided May 19, 1981

Stephen G. Ryan for appellant.

Kathleen I. Perkins, Assistant General Counsel, Federal Election Commission with whom *Charles N. Steele*, General Counsel and *Miriam Aguiar*, Attorney, Federal Election Commission were on the brief for appellee.

Before: TAMM and WALD, *Circuit Judges* and HAROLD GREENE *, *United States District Court Judge* for the District of Columbia.

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* Sitting by designation pursuant to 28 U.S.C. § 292(a).

Opinion for the Court filed by *Circuit Judge* WALD.

WALD, *Circuit Judge*: This case raises issues identical to those in *Federal Election Commission* v. *Machinists Non-Partisan Political League*, No. 80-1136, which we decide today. Respondent here is one of the so-called "draft-Kennedy" groups which in 1979 allegedly received contributions in violation of the Federal Election Campaign Act, 2 U.S.C. § 441a (a)(1)(C), (2)(C). *See also* 2 U.S.C. § 441a(f) ("No . . . political committee shall *knowingly* accept any contribution . . . in violation of the provisions of this section. No officer or employee of a political committee shall *knowingly* accept a contribution *made for the benefit or use of a candidate* . . . in violation of . . . this section") (emphasis supplied).

For the reasons stated in our opinion in No. 80-1136, we hold that the Commission has no jurisdiction over allegations that this respondent received contributions for its "draft-Kennedy" effort in excess of some supposed statutory limit. The subpoena issued to respondent by the Commission was therefore outside the scope of the Commission's investigative powers, and thus the district court's enforcement order must be vacated. This case is remanded for further proceedings consistent with our opinion in No. 80-1136.

So ordered.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Misc. Action No. 79-0291

FEDERAL ELECTION COMMISSION, PETITIONER

v.

MACHINISTS NON-PARTISAN POLITICAL LEAGUE, RESPONDENT

[Filed Jan. 30, 1980]

ORDER

This matter having come before the Court for hearing on January 28, 1980, upon the Federal Election Commission's petition for an order to show cause why its subpoena should not be enforced and respondent Machinist Non-Partisian Political League's (MNPL) counterclaim seeking declaratory and injunctive relief against the Commission and motion for preliminary injunction, and the Court having heard argument by counsel for the parties:

IT IS HEREBY ORDERED that the Commission's petition be, and hereby is, granted, and

IT IS FURTHER ORDERED that respondent MNPL produce for inspection and copying all of the documents and materials and answers to written questions requested by said Commission subpoena to MNPL, on February 5, 1980, at Room 701, 1325 K Street, N.W., Washington, D.C., and

IT IS FURTHER ORDERED that respondent MNPL's counterclaim for declaratory and injunc-

tive relief against the Commission be, and hereby is, dismissed as moot, and the accompanying motion for preliminary injunction be, and hereby is, denied, and

IT IS FURTHER ORDERED that respondent MNPL shall have five days from the date of this Order to file a motion for stay of judgment pending appeal with the court of appeals, and that no further order will be issued by this Court with respect to execution of the present order until such time as the court of appeals rules on the MNPL motion to stay judgment pending appeal.

Date—30 January 80

/s/ John H. Pratt
JOHN H. PRATT
United States District Court Judge

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Misc. Action No. 80-0009

FEDERAL ELECTION COMMISSION, PETITIONER

v.

CITIZENS FOR DEMOCRATIC ALTERNATIVES IN 1980, RESPONDENT

[Filed Feb. 29, 1980]

ORDER

This matter having come before the Court for hearing on February 29, 1980, upon the Federal Election Commission's petition for an order to show cause why its subpoena should not be enforced and respondent Citizen for Democratic Alternative's (CDA) motion to quash the Commission subpoena and the Court having heard argument by counsel for the parties;

IT IS HEREBY ORDERED that the Commission's petition be, and hereby is, granted, and

IT IS FURTHER ORDERED that respondent CDA produce for inspection and copying all of the documents and materials and answers to written questions requested by said Commission subpoena to CDA, on March 10, 1980, at Room 701, 1325 K Street, N.W. Washington, D.C. and

IT IS FURTHER ORDERED that respondent CDA's motion to quash the Commission subpoena to CDA be, and hereby is, denied.

Date—Feb. 29, 1980

/s/ John H. Pratt
United States District Court Judge

APPENDIX E

The Federal Election Campaign Act of 1971

(1) Including the "Federal Election Campaign Act Amendments of 1976," Public Law 94-283:

2 U.S.C. § 431. Definitions . . . .

(d) "political committee" means any committee, club, association, or other group of persons which receives contributions or makes expenditures during a calendar year in an aggregate amount exceeding $1,000;

2 U.S.C. § 437c. Federal Election Commission . . . .

(b)(1) The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to this Act and chapter 95 and chapter 96 of the Internal Revenue Code of 1954. The Commission shall have exclusive primary jurisdiction with respect to the civil enforcement of such provisions.

2 U.S.C. § 437d. Powers of Commission

(a) The Commission has the power to— . . . .

(3) to require by subpoena, signed by the chairman or the vice chairman, the attendance and testimony of witnesses and the production of all documentary evidence relating to the execution of its duties;

(4) in any proceeding or investigation, to order testimony to be taken by deposition before any person who is designated by the Commission and has the power to administer oaths and, in such instances, to compel

testimony and the production of evidence in the same manner as authorized under paragraph (3) of this subsection; . . . .

(10) to conduct investigations and hearings expeditiously, to encourage voluntary compliance, and to report apparent violations to the appropriate law enforcement authorities.

2 U.S.C. § 437g. Enforcement

(a)(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 has occurred may file a complaint with the Commission. Such complaint shall be in writing, shall be signed and sworn to by the person filing such complaint, and shall be notarized. Any person filing such a complaint shall be subject to the provisions of section 1001 of Title 18, United States Code. The Commission may not conduct any investigation under this section, or take any other action under this section, solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) The Commission upon receiving any complaint under paragraph (1), and if it has reason to believe that any person has committed a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954, or, if the Commission, on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, has reason to believe that such a violation has occurred, shall notify the person involved of such alleged violation and shall make an investigation of such alleged viola-

tion in accordance with the provisions of this section.

(3) (A) Any investigation under paragraph (2) shall be conducted expeditiously and shall include an investigation, conducted in accordance with the provisions of this section of reports and statements filed by any complainant under this title, if such complainant is a candidate.

(B) Any notification or investigation made under paragraph (2) shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

(4) The Commission shall afford any person who receives notice of an alleged violation under paragraph (2), a reasonable opportunity to demonstrate that no action should be taken against such person by the Commission under this Act.

(5) (A) If the Commission determines that there is reasonable cause to believe that any person has committed or is about to commit a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954, the Commission shall make every endeavor for a period of not less than 30 days to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with the person involved, ex-

cept that, if the Commission has reasonable cause to believe that—

(i) any person has failed to file a report required to be filed under section 434(a)(1)(C) for the calendar quarter occurring immediately before the date of a general election;

(ii) any person has failed to file a report required to be filed no later than 10 days before an election; or

(iii) on the basis of a complaint filed less than 45 days but more than 10 days before an election, any person has committed a knowing and willful violation of this Act or chapter 95 or chapter 96 of the Internal Revenue Code of 1954;

the Commission shall make every effort, for a period of not less than one-half the number of days between the date upon which the Commission determines there is reasonable cause to believe such a violation has occurred and the date of the election involved, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with the person involved. A conciliation agreement, unless violated, shall constitute a complete bar to any further action by the Commission, including the bringing of a civil proceeding under subparagraph (B).

(B) If the Commission is unable to correct or prevent any such violation by such

informal methods, the Commission may, if the Commission determines there is probable cause to believe that a violation has occurred or is about to occur, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to the amount of any contribution or expenditure involved in such violation, in the district of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

(C) In any civil action instituted by the Commission under subparagraph (B), the court may grant a permanent or temporary injunction, restraining order, or other order, including a civil penalty which does not exceed the greater of $5,000 or an amount equal to the amount of any contribution or expenditure involved in such violation, upon a proper showing that the person involved has engaged or is about to engage in a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954.

(D) If the Commission determines that there is probable cause to believe that a knowing and willful violation subject to and as defined in section 441j, or a knowing and willful violation of a provision of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 has occurred or is about to occur, it may refer such apparent violation

to the Attorney General of the United States without regard to any limitation set forth in subparagraph (A).

(6) (A) If the Commission believes that there is clear and convincing proof that a knowing and willful violation of this Act or chapter 95 or chapter 96 of the Internal Revenue Code of 1954 has been committed, a conciliation agreement entered into by the Commission under paragraph (5)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which shall not exceed the greater of (i) $10,000; or (ii) an amount equal to 200 percent of the amount of any contribution or expenditure involved in such violation.

(B) If the Commission believes that a violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 has been committed, a conciliation agreement entered into by the Commission under paragraph (5)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of (i) $5,000; or (ii) an amount equal to the amount of the contribution or expenditure involved in such violation.

(C) The Commission shall make available to the public (i) the results of any conciliation attempt, including any conciliation agreement entered into by the Commission; and (ii) any determination by the Commission that no violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954 has occurred.

(7) In any civil action for relief instituted by the Commission under paragraph (5), if the court determines that the Commission has established through clear and convincing proof that the person involved in such civil action has committed a knowing and willful violation of this Act or of chapter 95 or chapter 96 of the Internal Revenue Code of 1954, the court may impose a civil penalty of not more than the greater of (a) $10,000; or (b) an amount equal to 200 percent of the contribution or expenditure involved in such violation. In any case in which such person has entered into a conciliation agreement with the Commission under paragraph (5)(A), the Commission may institute a civil action for relief under paragraph (5) if it believes that such person has violated any provision of such conciliation agreement. In order for the Commission to obtain relief in any such civil action, it shall be sufficient for the Commission to establish that such person has violated, in whole or in part, any requirement of such conciliation agreement.

(8) In any action brought under paragraph (5) or paragraph (7), subpoenas for witnesses who are required to attend a United States district court may run into any other district.

(9) (A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure on the part of the Commission to act on such complaint in accordance with the provisions of this section within 90 days after the filing of such complaint, may

file a petition with the United States District Court for the District of Columbia.

(B) The filing of any petition under subparagraph (A) shall be made—

(i) in the case of the dismissal of a complaint by the Commission, no later than 60 days after such dismissal; or

(ii) in the case of a failure on the part of the Commission to act on such complaint, no later than 60 days after the 90-day period specified in subparagraph (A).

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the action, or the failure to act, is contrary to law and may direct the Commission to proceed in conformity with such declaration within 30 days, failing which the complainant may bring in his own name a civil action to remedy the violation involved in the original complaint.

(10) The judgment of the district court may be appealed to the court of appeals and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28, United States Code.

(11) Any action brought under this subsection shall be advanced on the docket of the court in which filed, and put ahead of all other

actions (other than other actions brought under this subsection or under section 437h of this title).

(12) If the Commission determines after an investigation that any person has violated an order of the court entered in a proceeding brought under paragraph (5) it may petition the court for an order to adjudicate such person in civil contempt, except that if it believes the violation to be knowing and willful it may petition the court for an order to adjudicate such person in criminal contempt.

(b) In any case in which the Commission refers an apparent violation to the Attorney General, the Attorney General shall respond by report to the Commission with respect to any action taken by the Attorney General regarding such apparent violation. Each report shall be transmitted no later than 60 days after the date the Commission refers any apparent violation, and at the close of every 30-day period thereafter until there is final disposition of such apparent violation. The Commission may from time to time prepare and publish reports on the status of such referrals.

(c) Any member of the Commission, any employee of the Commission, or any other person who violates the provisions of subsection (a)(3)(B) shall be fined not more than $2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions of subsection (a)(3)(B) shall be fined not more than $5,000.

2 U.S.C. § 441a. Limitations on contributions and expenditures

(a) *Contributions by persons and committees.*

(1) No person shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $1,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $20,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(2) No multicandidate political committee shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidates, in any calendar year, which, in the aggregate, exceed $15,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

2 U.S.C. § 441b. Contributions or expenditures by national banks, corporations, or labor organizations

(a) It is unlawful for any national bank, or any corporation organized by authority of any

law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committees, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.

(b) (1) For the purposes of this section the term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(2) For purposes of this section and section 79*l*(h) of title 15, the term "contribution or expenditure" shall include any di-

rect or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election to any of the offices referred to in this section, but shall not include—

(A) communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject;

(B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families; and

(C) the establishment, administration, and solicitation of contributions to a separate segregated fund to be utilized for political purposes by a corporation, labor organization, membership organization, cooperative, or corporation without capital stock.

(3) It shall be unlawful—

(A) for such a fund to make a contribution or expenditure by utilizing

money or anything of value secured by physical force, job discrimination, financial reprisals, or the threat of force, job discrimination, or financial reprisal; or by dues, fees, or other moneys required as a condition of membership in a labor organization or as a condition of employment, or by moneys obtained in any commercial transaction;

(B) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee of the political purposes of such fund at the time of such solicitation; and

(C) for any person soliciting an employee for a contribution to such a fund to fail to inform such employee, at the time of such solicitation, of his right to refuse to so contribute without any reprisal.

(4) (A) Except as provided in subparagraphs (B), (C), and (D), it shall be unlawful—

(i) for a corporation, or a separate segregated fund established by a corporation, to solicit contributions to such a fund from any person other than its stockholders and their families and its executive or administrative personnel and their families, and

(ii) for a labor organization, or a separate segregated fund established by a labor organization, to

solicit contributions to such a fund from any person other than its members and their families.

(B) It shall not be unlawful under this section for a corporation, a labor organization, or a separate segregated fund established by such corporation or such labor organization, to make 2 written solicitations for contributions during the calendar year from any stockholder, executive or administrative personnel, or employee of a corporation or the families of such persons. A solicitation under this subparagraph may be made only by mail addressed to stockholders, executive or administrative personnel, or employees at their residence and shall be so designed that the corporation, labor organization, or separate segregated fund conducting such solicitation cannot determine who makes a contribution of $50 or less as a result of such solicitation and who does not make such a contribution.

(C) This paragraph shall not prevent a membership organization, cooperative, or corporation without capital stock, or a separate segregated fund established by a membership organization, cooperative, or corporation without capital stock, from soliciting contributions to such a fund from members of such organization, cooperative, or corporation without capital stock.

(D) This paragraph shall not prevent a trade association or a separate segregated fund established by a trade association from soliciting contributions from the stockholders and executive or administrative personnel of the member corporations of such trade association and the families of such stockholders or personnel to the extent that such solicitation of such stockholders and personnel, and their families, has been separately and specifically approved by the member corporation involved, and such member corporation does not approve any such solicitation by more than one such trade association in any calendar year.

(5) Notwithstanding any other law, any method of soliciting voluntary contributions or of facilitating the making of voluntary contributions to a separate segregated fund established by a corporation, permitted by law to corporations with regard to stockholders and executive or administrative personnel, shall also be permitted to labor organizations with regard to their members.

(6) Any corporation, including its subsidiaries, branches, divisions, and affiliates, that utilizes a method of soliciting voluntary contributions or facilitating the making of voluntary contributions, shall make available such method, on written request and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby, to a labor organization represent-

ing any members working for such corporation, its subsidiaries, branches, divisions, and affiliates.

(7) For purposes of this section, the term "executive or administrative personnel" means individuals employed by a corporation who are paid on a salary, rather than hourly, basis and who have policymaking, managerial, professional, or supervisory responsibilities.

(2) FECA after Public Law 96-187:

2 U.S.C. § 431. Definitions . . . .

(4) The term "political committee" means—

(A) any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year; or

(B) any separate segregated fund established under the provisions of section 441b(b) of this title; or

(C) any local committee of a political party which receives contributions aggregating in excess of $5,000 during a calendar year, or makes payments exempted from the definition of contribution or expenditure as defined in paragraphs (8) and (9) of this section aggregating in excess of $5,000 during a calendar year, or makes contributions aggregating in excess of $1,000 during a calendar year.

2 U.S.C. § 437c. Federal Election Commission . . . .

(b) *Administration, enforcement, and formulation of policy; exclusive jurisdiction of civil enforcement; Congressional authorities or functions with respect to elections for Federal office.*

(1) The Commission shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act and chapter 95 and chapter 96 of title 26. The Commission shall have exclusive jurisdiction with respect to the civil enforcement of such provisions.

2 U.S.C. § 437d. Powers of the Commission

(a) *Specific authorities.* The Commission has the power— . . . .

(3) to require by subpoena, signed by the chairman or the vice chairman, the attendance and testimony of witnesses and the production of all documentary evidence relating to the execution of its duties;

(4) in any proceeding or investigation, to order testimony to be taken by deposition before any person who is designated by the Commission and has the power to administer oaths and, in such instances, to compel testimony and the production of evidence in the same manner as authorized under paragraph (3); . . . .

(9) to conduct investigations and hearings expeditiously, to encourage voluntary compliance, and to report apparent violations to the appropriate law enforcement authorities.

2 U.S.C. § 437g. Enforcement

(a) *Administrative and judicial practice and procedure.*

(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of title 26 has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of title 18, United States Code. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

(2) If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act or chapter 95 or chapter 96 of title 26, the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation.

The Commission shall make an investigation of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.

(3) The general counsel of the Commission shall notify the respondent of any recommendation to the Commission by the general counsel to proceed to a vote on probable cause pursuant to paragraph (4)(A)(i). With such notification, the general counsel shall include a brief stating the position of the general counsel on the legal and factual issues of the case. Within 15 days of receipt of such brief, respondent may submit a brief stating the position of such respondent on the legal and factual issues of the case, and replying to the brief of general counsel. Such briefs shall be filed with the Secretary of the Commission and shall be considered by the Commission before proceeding under paragraph (4).

(4) (A) (i) Except as provided in clause (ii), if the Commission determines, by an affirmative vote of 4 of its members, that there is probable cause to believe that any person has committed, or is about to commit, a violation of this Act or of chapter 95 or chapter 96 of title 26, the Commission shall attempt, for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion, and to enter into a conciliation agreement with any person involved. Such attempt by the Commission to correct or prevent such violation may continue for a period of not more than 90 days. The Commission may not enter into a conciliation agreement

under this clause except pursuant to an affirmative vote of 4 of its members. A conciliation agreement, unless violated, is a complete bar to any further action by the Commission, including the bringing of a civil proceeding under paragraph (6)(A).

(ii) If any determination of the Commission under clause (i) occurs during the 45-day period immediately preceding any election, then the Commission shall attempt, for a period of at least 15 days, to correct or prevent the violation involved by the methods specified in clause (i).

(B) (i) No action by the Commission or any person, and no information derived, in connection with any conciliation attemp by the Commission under subparagraph (A) may be made public by the Commission without the written consent of the respondent and the Commission.

(ii) If a conciliation agreement is agreed upon by the Commission and the respondent, the Commission shall make public any conciliation agreement signed by both the Commission and the respondent. If the Commission makes a determination that a person has not violated this Act or chapter 95 or chapter 96 of title 26, the Commission shall make public such determination.

(5)(A) If the Commission believes that a violation of this Act or of chapter 95 or chapter

96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may include a requirement that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation.

(B) If the Commission believes that a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26 has been committed, a conciliation agreement entered into by the Commission under paragraph (4)(A) may require that the person involved in such conciliation agreement shall pay a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(C) If the Commission by an affirmative vote of 4 of its members, determines that there is probable cause to believe that a knowing and willful violation of this Act which is subject to subsection (d) of this section, or a knowing and willful violation of chapter 95 or chapter 96 of title 26, has occurred or is about to occur, it may refer such apparent violation to the Attorney General of the United States without regard to any limitations set forth in paragraph (4)(A).

(D) In any case in which a person has entered into a conciliation agreement with the Commission under paragraph (4)(A), the Commission may instittue a civil action for relief under paragraph (6)(A) if it believes that the person has violated any provision of such conciliation agreement. For the Commission to ob-

tain relief in any civil action, the Commission need only establish that the person has violated, in whole or in part, any requirement of such conciliation agreement.

(6)(A) If the Commission is unable to correct or prevent any violation of this Act or of chapter 95 or chapter 96 of title 26, by the methods specified in paragraph (4)(A), the Commission may, upon an affirmative vote of 4 of its members, institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order (including an order for a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation) in the district court of the United States for the district in which the person against whom such action is brought is found, resides, or transacts business.

(B) In any civil action instituted by the Commission under subparagraph (A), the court may grant a permanent or temporary injunction, restraining order, or other order including a civil penalty which does not exceed the greater of $5,000 or an amount equal to any contribution or expenditure involved in such violation, upon a proper showing that the person involved has committed, or is about to commit (if the relief sought is a permanent or temporary injunction or a restraining order), a violation of this Act or chapter 95 or chapter 96 of title 26.

(C) In any civil action for relief instituted by the Commission under subparagraph (A), if the court determines that the Commission has established that the person involved in such civil ac-

tion has committed a knowing and willful violation of this Act or of chapter 95 or chapter 96 of title 26, the court may impose a civil penalty which does not exceed the greater of $10,000 or an amount equal to 200 percent of any contribution or expenditure involved in such violation.

(7) In any action brought under paragraph (5) or (6), subpoenas for witnesses who are required to attend a United States district court may run into any other district.

(8) (A) Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

(B) Any petition under subparagraph (A) shall be filed, in the case of a dismissal of a complaint by the Commission, within 60 days after the date of the dismissal.

(C) In any proceeding under this paragraph the court may declare that the dismissal of the complaint or the failure to act is contrary to law, and may direct the Commission to conform with such declaration within 30 days, failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint.

(9) Any judgment of a district court under this subsection may be appealed to the court of appeals, and the judgment of the court of appeals affirming or setting aside, in whole or in part, any such order

of the district court shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

(10) Any action brought under this subsection shall be advanced on the docket of the court in which filed, and put ahead of all other actions (other than other actions brought under this subsection or under section 437h of this title).

(11) If the Commission determines after an investigation that any person has violated an order of the court entered in a proceeding brought under paragraph (6), it may petition the court for an order to hold such person in civil contempt, but if it believes the violation to be knowing and willful it may petition the court for an order to hold such person in criminal contempt.

(12) (A) Any notification or investigation made under this section shall not be made public by the Commission or by any person without the written consent of the person receiving such notification or the person with respect to whom such investigation is made.

(B) Any member or employee of the Commission, or any other person, who violates the provisions of subparagraph (A) shall be fined not more than $2,000. Any such member, employee, or other person who knowingly and willfully violates the provisions of subparagraph (A) shall be fined not more than $5,000.

(b) *Notice to persons not filing reports prior to institution of enforcement action; publication of identity of persons and unfiled reports.* Before taking any action under subsection (a) of this section

against any person who has failed to file a report required under section 434(a)(2)(A)(iii) of this title for the calendar quarter immediately preceding the election involved, or in accordance with section 434(a)(2)(A)(i), the Commission shall notify the person of such failure to file the required reports. If a satisfactory response is not received within 4 business days after the date of notification, the Commission shall, pursuant to section 438(a)(7) of this title, publish before the election the name of the person and the report or reports such person has failed to file.

(c) *Reports by Attorney General of apparent violations.* Whenever the Commission refers an apparent violation to the Attorney General, the Attorney General shall report to the Commission any action taken by the Attorney General regarding the apparent violation. Each report shall be transmitted within 60 days after the date the Commission refers an apparent violation, and every 30 days thereafter until the final disposition of the apparent violation.

(d) *Penalties; defenses; mitigation of offenses.*

(1) (A) Any person who knowingly and willfully commits a violation of any provision of this Act which involves the making, receiving, or reporting of any contribution or expenditure aggregating $2,000 or more during a calendar year shall be fined, or imprisoned for not more than one year, or both. The amount of this fine shall not exceed the greater of $25,000 or 300 percent of any contribution or expenditure involved in such violation.

(B) In the case of a knowing and willful violation of section 441b(b)(3), the penalties

set forth in this subsection shall apply to a violation involving an amount aggregating $250 or more during a calendar year. Such violation of section 441b(b)(3) may incorporate a violation of section 441c(b), 441f or 441g of this title.

(C) In the case of a knowing and willful violation of section 441h of this title, the penalties set forth in this subsection shall apply without regard to whether the making, receiving, or reporting of a contribution or expenditure of $1,000 or more is involved.

(2) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of title 26, any defendant may evidence their lack of knowledge or intent to commit the alleged violation by introducing as evidence a conciliation agreement entered into between the defendant and the Commission under subsection (a)(4)(A) which specifically deals with the act or failure to act constituting such violation and which is still in effect.

(3) In any criminal action brought for a violation of any provision of this Act or of chapter 95 or chapter 96 of title 26, the court before which such action is brought shall take into account, in weighing the seriousness of the violation and in considering the appropriateness of the penalty to be imposed if the defendant is found guilty, whether—

(A) the specific act or failure to act which constitutes the violation for which the action was brought is the subject of a conciliation agreement entered into between the defendant and the Commission under subparagraph (a)(4)(A);

(B) the conciliation agreement is in effect; and

(C) the defendant is, with respect to the violation involved, in compliance with the conciliation agreement.

2 U.S.C. § 441a. Limitations on contributions and expenditures

(a) *Dollar limits on contributions.*

(1) No person shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $1,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed $20,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

(2) No multicandidate political committee shall make contributions—

(A) to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $5,000;

(B) to the political committees established and maintained by a national political party, which are not the authorized political committees of any candidate, in any calendar year, which, in the aggregate, exceed $15,000; or

(C) to any other political committee in any calendar year which, in the aggregate, exceed $5,000.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Misc. No. 79-0291

FEDERAL ELECTION COMMISSION, PETITIONER
vs.
MACHINISTS NON-PARTISAN POLITICAL LEAGUE, RESPONDENT

Monday, January 28, 1980
Washington, D.C.

The above-entitled matter came on for a show cause hearing before The Honorable John H. Pratt, United States District Judge, at 9:45 a.m.

Appearances:

On behalf of the Petitioner:

LAWRENCE M. NOBLE, ESQUIRE
MARSHA G. GENTNER, ESQUIRE

On behalf of the Respondent:

JOHN SILARD, ESQUIRE.

THE COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

As probably is apparent from some of the questions that were asked of Mr. Silard, we're going to grant the Commission's petition to enforce the subpoena and by way of explanation, I'd like to say the following.

The chief issues raised by the respondent in this case are first of all, the nature of the subpoena and whether it falls within the guidelines of enforceability, and second that the Commission lacks jurisdiction over the subject matter which raises the collateral question as to whether or not such a defense can be raised at the subpoena enforcement stage of the proceeding, i.e., whether this lack of statutory jurisdiction can be raised by the respondent at this time. In addition, they ask for a declaratory judgment and preliminary injunction. As I indicated earlier, it seemed to me that those issues would be mooted out if we granted the government the relief they seek. But even if this were an original suit by the Machinists against FEC for an injunction, preliminary injunction, I think we would be required to hold that they would not have demonstrated a substantial likelihood of success on the merits, and therefore, we would have denied a motion for preliminary injunction on that ground, alone.

But getting back to the matter of the guidelines of enforceability—and this has nothing to do with the merits of the case—and these guidelines have been set forth in a number of cases and one of them, of course, being Morton Salt, the requirements to be met are first that the inquiry must be made within the authority of the agency. I don't think there is any question but what this inquiry is within the authority of the Federal Elections Commission. It was just this type of matter that caused Congress to set the whole machinery in motion when it enacted the statute. Second, is that the demand must not be too indefinite and this, of course, is a sweeping subpoena, but because of the very nature of the subject matter, I think it is about as specific as could be expected. And third

is that the information sought must be reasonably relevant. It seems to me without any question this information is reasonably relevant if the Commission is going to attempt to carry out its statutory duties as set forth in the Act. So much for the matter of the validity of the subpoena, itself.

With respect to the matter of lack of jurisdiction, it seems to me that it has been well established that this type of matter, lack of jurisdiction, is something that has to be addressed at the first instance to the Commission, itself, when the enforcement proceeding, if any, takes place. It is perfectly true that they didn't rule on the question when the respondent filed its motion to quash before the Commission, but the Commission was not required to rule on every single one of the objections that were raised through the matter of the subpoena. But getting back to the matter of lack of jurisdiction—and we don't get into the merits in our discussion at all, but the cases seem to hold that a subpoena enforcement proceeding is not to say in which the one subpoena is raised as a defense that the agency is exceeding the scope of its statutory authority and I would like to give for the record the following quote in SEC against Wall Street Transcript Corporation, appearing at 422 Fed. 2nd, 1371 and 1375, in which it was stated:

> "It has long been established that the question of the inclusion of a particular person or entity within the coverage of a regulatory statute is generally for initial determination by an agency, subject to review on direct appeal, rather than for a district court whose jurisdiction is invoked to enforce an administrative subpoena. So long as an agency "establishes that an investigation 'will be conducted pursuant to a legitimate pur-

> pose, that the inquiry may be relevant to the purpose, that the information sought is not already within its possession, and that the administrative steps required have been followed,' no showing of probable cause may be made to the district court unless a statute indicates otherwise."

And in accord with that, of course, is the Endicott Johnson case, 317 U.S. 501, et cetera.

Now for all of these reasons, we are going to grant the Government's petition to enforce the subpoena and the opinion we've just given will be the statement of reasons which accompanies the Government's submission for a proposed order.

APPENDIX G

(1) *Annual Report 1975*, Federal Election Commission (Washington, D.C., March 1976)

(at page 79)

Legislative Recommendations . . .

Draft Movements

Thought should be given to amending the law to make the contribution limitations applicable to draft movements. Under the present law, an individual is not a candidate unless he takes the action necessary to get on the ballot, makes or raises or authorizes a person to make or raise contributions or expenditures on his behalf or takes other affirmative action to become elected to Federal office. Thus, draft movements on behalf of individuals (who are not candidates under the definition contained in the Act) may accept contributions up to $25,000 from individuals and of unlimited amounts from political committees. The existing disclosure requirements for draft movements should be retained.

(2) *Federal Election Commission: Annual Report 1976*, Federal Election Commission (Washington, D.C., March 1977)

(at pages 74-75)

Legislative Recommendations . . .

Draft Movements

The Congress may wish to consider amending the Act to bring draft movements within the reporting provisions and contribution limitations. Under the Act, an individual does not become a candidate until he or she takes the action neces-

sary to get on the ballot, makes or raises or authorizes a person to make or raise contributions or expenditures on his or her behalf or takes other affirmative action to become a Federal candidate. The reporting requirement in 2 U.S.C. § 434 applies to political committees supporting a candidate or candidates, to candidates, and to persons who make contributions or independent expenditures on behalf of clearly identified candidates. Thus, persons or committees supporting a draft movement on behalf of an individual who is not a candidate within the meaning of the Act may not have any reporting obligation. Section 434 should be amended to require reporting by political committees whose purpose is to influence a clearly identified individual or individuals to become a candidate and to require the reporting of contributions or independent expenditures expressly advocating that a clearly identified individual become or refrain from becoming a candidate.

Consideration should also be given to the application of contribution limitations to draft movements. Since the $1,000 limitation on contributions by persons applies only to candidates, a person could now give up to $5,000—the limit applicable to contributions to political committees—to a draft committee. Congress may wish to amend the limitation section to make the $1,000 limitation applicable to contributions to political committees whose purpose is to influence a clearly identified individual or individuals to become a candidate. Although the limitation on contributions by multicandidate committees to candidates or to draft committees is identical, multicandidate committees, as well as persons,

would be able to make two contributions toward the nomination of an individual—one contribution to a draft movement and, if the individual becomes a candidate, one contribution to the candidate. Accordingly, Congress may wish to consider amending the Act to provide that a person who has contributed to a draft committee with the knowledge that a substantial portion of his or her contribution will be expended on behalf of a clearly identified individual will, for the purposes of contribution limitations, be considered to have made a contribution to a "candidate." If that individual should become a candidate, the contributors to the draft movement would be eligible to give to the candidate only to the extent their earlier contributions did not exceed the "candidate" limits.

(3) *Federal Election Commission: Annual Report 1979*, Federal Election Commission (Washington, D.C., 1980)

(at pages 38-39)

Legislative Recommendations . . .

Contributions to Draft Committees

Consideration should be given to the application of contribution limitations to draft movements. Since the $1,000 limitation on contributions by persons other than multicandidate committees applies only to candidates, a person may give up to $5,000 per year—the limit applicable to "other political committees"—to a draft committee. Precisely this situation was presented in Advisory Opinion 1979-40. Congress may wish to amend the statute to make the $1,000 limitation, rather than the $5,000 limitation, ap-

plicable to contributions to political committees whose purpose is to influence a clearly identified individual or individuals to become a candidate.

Although the limitation on contributions by multicandidate committees to candidates or to draft committees is $5,000, multicandidate committees, as well as other persons, may make two contributions toward the nomination of an individual—one contribution to a draft movement and, if the individual later becomes a candidate, another contribution to the candidate's authorized committee. Accordingly, Congress may wish to consider amending the Act to provide that a person who has contributed to a draft committee with the knowledge that his or her contribution will be expended to draft a clearly identified individual will, for the purposes of the contribution limitations, be considered to have made a contribution to a "candidate." If that individual should become a candidate, the contributors to the draft movement would be eligible to give to the candidate's authorized committees only to the extent their earlier aggregate contributions did not exceed the "candidate" limits.

(4) *Federal Election Commission: Annual Report 1980*, Federal Election Commission (Washington, D.C., 1981)

(at pages 4-5)

Legislative Recommendations . . .

Contributions to Draft Committees (2 U.S.C. § 441a)

Consideration should be given to the contribution limitations that apply to draft committees.

Since the $1,000 limitation on contributions by persons other than multicandidate committees applies only to candidates, a person may give up to $5,000 per year—the limit applicable to "other political committees"—to a draft committee. Precisely this situation was presented in Advisory Opinion 1979-40. Congress may wish to amend the statute to make the $1,000 limitation, rather than the $5,000 limitation, applicable to contributions to political committees whose purpose is to influence a clearly identified individual to become a candidate.

Although the limitation on contributions by multicandidate committees to candidates or to draft committees is $5,000, multicandidate committees, as well as other persons, may make two contributions toward the nomination of an individual—one contribution to a draft movement and, if the individual later becomes a candidate, another contribution to the candidate's authorized committee. Accordingly, Congress may wish to consider amending the Act to provide that a person who has contributed to a draft committee with the knowledge that his or her contribution will be expended to draft a clearly identified individual will, for the purposes of the contribution limitations, be considered to have made a contribution to a "candidate." If that individual should become a candidate, the contributors to the draft movement would be eligible to give to the candidate's authorized committees only to the extent their earlier aggregate contributions did not exceed the "candidate" limits.

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Opposition

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No. 81-299

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL ELECTION COMMISSION,
Petitioner,
v.
MACHINISTS NON-PARTISAN POLITICAL LEAGUE,
Respondent.

FEDERAL ELECTION COMMISSION,
Petitioner,
v.
CITIZENS FOR DEMOCRATIC ALTERNATIVES IN 1980,
Respondent.

BRIEF IN OPPOSITION OF CITIZENS FOR DEMOCRATIC ALTERNATIVES IN 1980, RESPONDENT

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the Federal Election Commission was without subject matter jurisdiction over activities aimed at inducing an individual to become a candidate for the Presidency pursuant to the Federal Election Campaign Act, at least prior to January 8, 1980, the date on which certain amendments to the Act became effective.

2. Whether courts may in their discretion refuse to enforce Federal Election Commission subpoenas inquiring into protected First Amendment activities over which the Commission has no jurisdiction.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

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FEDERAL ELECTION COMMISSION,
Petitioner,

v.

MACHINISTS NON-PARTISAN POLITICAL LEAGUE,
Respondent.

FEDERAL ELECTION COMMISSION,
Petitioner,

v.

CITIZENS FOR DEMOCRATIC ALTERNATIVES IN 1980,
Respondent.

BRIEF IN OPPOSITION OF CITIZENS FOR DEMOCRATIC ALTERNATIVES IN 1980, RESPONDENT

The Federal Election Commission (the "FEC" or the "Commission") has sought to portray the decision below as a significant departure from existing law with vast and unintended consequences for the political process, and for its enforcement function. It draws this misleading picture by loosely playing on the word "candidate" in a manner inconsistent with the Federal Election Campaign Act (FECA), judicial construction of FECA, and the Commission's own previous pronouncements, and by oversimplifying the standards applied by the Court below in refusing to enforce the Commission's subpoena. We submit that the unanimous opinion of the Court of Appeals is no more than a reflection of existing

law, fully consistent with the opinions of this Court, and we know of no conflict between the circuits with respect to the matters at issue herein. The writ should not be granted. Moreover, resolution of the substantive issue here—coverage of "draft" activities—will hinge on interpretation of a statute which has since been amended by Congress, and the decision of the Court below as to the procedural matter is interlocutory in nature in that the Commission is still free to continue its investigations under terms set forth by the Court—and in accordance with new procedures mandated by Congress. These considerations alone provide strong grounds for denying the petition. An account of the factual background of this case together with certain aspects of its procedural history will shed further light on the correctness of the Court of Appeals decision.

COUNTER-STATEMENT OF THE CASE [1]

1. *Citizens for Democratic Alternatives in 1980 (CDA)—Activities.* This case stems from the Federal Election Commission's attempts to assert regulatory and investigatory jurisdiction over pre-candidacy, "draft" political activities that have heretofore been deemed outside of its purview. Beginning in the spring of 1979, many in the Democratic Party evidenced sharp concern over the presidency of Jimmy Carter and the likely dangers that his renomination presented to other elected Democrats. Concern for the future of the party's officeholders was coupled with the sense that the President had in important respects proved incapable or unwilling to implement many of the progressive social and economic principles which had been embodied in the Demo-

[1] The facts as set forth herein are as they are stated in Respondent's Memorandum of Points and Authorities In Support of Its Motion to Quash, dated Feb. 15, 1980, before the District Court and reproduced as Joint Appendix E in the court below in *FEC v. CDA*, No. 80-1256. They have not been disputed.

cratic platform in 1976. In this environment various groups coalesced in search for an electable Democratic alternative. Much of this effort focused on generating sufficient popular support to persuade Senator Edward M. Kennedy to commit to the race against the incumbent.

CDA was organized on August 10, 1979 by a few individuals seeking such an alternative to the reelection of President Carter, and it interacted with others committed to the same goal. With modest funding (none of it from the Machinist Nonpartisan Political League (MNPL)),[2] CDA's principal activity was the preparation and distribution of a weekly newsletter to which various press clippings, polls and similar items were attached. Many of these items were focused on issue analysis and were sent to other groups sharing CDA's goals, as well as to any interested members of the public. CDA undertook some fund raising activities on its own behalf, and in a few cases volunteers were referred to other committees in various states which were at the time deemed important to the possible candidacy of Senator Kennedy. The efforts of these various groups bore fruit a few months later when Senator Kennedy declared his candidacy on November 7, 1979.

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[2] The FEC has made much in its petition (p. 9 *et seq.*) of the fact that the MNPL is a separate segregated fund which is subject to special accounting rules under FECA. It should be emphasized that CDA is not a separate segregated fund, and no allegation has been made that it is affiliated with the MNPL.

CDA believes that in making these assertions about the MNPL, the Commission is failing to distinguish between subject matter jurisdiction (the Securities and Exchange Commission could obviously not investigate the unfair labor practices of a publicly held company) and in personam jurisdiction, and is only now raising a red herring, which it has not previously argued. But even, should the Court choose to examine only the narrow question of jurisdiction over separate segregated funds engaged in draft activities, Respondent respectfully submits that a writ with respect to CDA's case should not issue.

CDA made no cash contributions to any of the other draft committees, only the most minimal in-kind contributions, and none of its principals has held any position of authority with any of the other draft organizations. Once the Kennedy candidacy was announced, CDA made no further expenditures to induce the Senator to become a candidate and made no expenditures to promote the Senator's campaign. At no time were CDA's activities directed, financed or otherwise controlled by either Senator Kennedy, his campaign committee, or any others speaking or acting on his behalf, nor has such an allegation been made. CDA is presently inactive and continues in existence only to liquidate its debts and contest the FEC's assertion of jurisdiction over its draft-Kennedy activities.

2. *Commission Proceedings.* The FEC investigation into CDA's activities had its genesis in a complaint filed by the Carter-Mondale Presidential Committee, Inc., (hereinafter the "Carter-Mondale Committee"), at a time when President Carter's standing in nationwide polls was at an all-time low. The complaint was filed less than two weeks before the Florida Democratic Party County Caucuses, which were seen as a test of the President's strength, and was done so with substantial public fanfare in apparent violation of the confidentiality provisions of the Federal Election Campaign Act (FECA).[3] The Carter-Mondale Complaint alleged that a variety of groups and individuals including CDA were "affiliated" within the meaning of FECA and that certain of these persons and entities (but not CDA) may have exceeded contribution limitations allegedly imposed by FECA. The Complaint was amended by the Carter-

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[3] 2 U.S.C. § 437g(a)(3)(B) (amended 1980) prohibited disclosure by any person of investigatory matters before the Commission.

Mondale Committee on November 5, 1979, to add additional alleged affiliates and to assert further that Senator Kennedy had become a candidate within the meaning of FECA no later than September 1, 1979.

On the basis of the first Complaint, the FEC notified CDA that it found reason to believe that CDA may have been affiliated with eight other groups, and that it may have failed to report this putative affiliation. On the heels of the amended Complaint, two additional draft committees were added to the list of possible affiliates, *but no allegation was made at any time that CDA was in any way connected with Senator Kennedy or his campaign committee, nor was CDA advised that the Senator had become a candidate, declared or undeclared, prior to his announcement in November.*

Affiliation is a concept derived from the so-called nonproliferation provision of FECA which is intended to prevent evasion of campaign contribution limits through the establishment of a number of political committees by the same person, groups of persons, or organizations.[4] The tests of affiliation under FECA are (1) common control, (2) common maintenance, (3) common establishment, or (4) common financing.[5] Under FECA and Commission regulations affiliated committees are treated as a single committee for only one purpose: they are limited in the contributions which they make to nonaffiliated political committees to the limitations imposed on a single committee.[6]

The factual allegations in the Carter-Mondale Complaint, even if true, fell well short of establishing a *prima facie* case of affiliation, and in addition the thres-

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[4] 2 U.S.C. § 441a(a)(5).

[5] *Id.*

[6] *Id.*; 11 C.F.R. § 100.14(c) (1980).

hold question of Commission jurisdiction over draft activities was not addressed. CDA repeatedly attempted to seek further clarification of the basis of the Commission's action, as well as extensions of time in which to gather facts concerning the other named committees, so that it could demonstrate that no further action should be taken —an opportunity theoretically afforded to it by Commission procedures.[7] The FEC summarily denied CDA's requests, but CDA did submit timely and extensive responses.

Without considering CDA's submissions, the FEC served on CDA a comprehensive order to produce documents and materials and to answer written questions. The order sought records concerning meetings, discussions, correspondence, and communications between and among CDA, its adherents and a variety of other groups and individuals. It sought disclosure of the identity of all persons approached by CDA (whether or not they in fact offered assistance), the names of all of CDA's members and volunteers, and the telephone and travel records of all those so associated.

CDA promptly filed a Motion to Quash on various grounds and once it was able to ascertain that virtually all of the named committees had shut down their operations when the draft had succeeded, CDA filed a motion to dismiss on jurisdictional grounds, together with a motion to stay discovery pending resolution of the jurisdictional issue. The Commission responded with the bald assertion that it had no procedures for considering jurisdictional questions raised in Motions to Dismiss and filed a petition for enforcement of its order in the District Court. While appeal of this case was pending below, the original complainant, the Carter-Mondale Committee, asked the FEC to drop the investigation, as no useful

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[7] *See* 2 U.S.C. § 437g(a) (amended 1980).

purpose could be served by it;[8] the Commission apparently refused.

3. *Judicial Proceedings.* The District Court denied CDA's Motion to Quash without explanation or opinion[9] and the denial was appealed. The Court of Appeals, agreeing with CDA (and with the MNPL in the companion case), made a two part finding:[10] first, that at least with respect to activities which preceded certain amendments made to FECA which became effective as of January 8, 1980, the FEC lacked subject matter jurisdiction:

> All of this—the absence of any indication that Congress affirmatively intended to make "draft" groups political committees for contribution purposes; the Commission's admission that prior to 1979 Congress never even faced the issue of "draft" groups; the

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[8] Letter from Robert Strauss to FEC Chairman Max Friedersdorf, dated June 19, 1980. A copy appears as Appendix A hereto.

[9] Joint Appendix G in *CDA v. FEC*, No. 80-1256.

[10] CDA is in complete accord with the ruling of the Court below and finds its reasoning dispositive. In the event, however, that this Court should accept Petitioner's arguments, CDA should be given an opportunity to be heard either in this Court or the courts below with respect to a number of contentions which the Court of Appeals found it unnecessary to reach. These included (1) the arbitrary nature of the Commission's findings of "reason to believe" that violations of FECA had occurred; (2) the absence of a compelling governmental interest to support the subpoena, even if jurisdiction were present, since the contribution provision of FECA could not have been breached; (3) the presence of a series of procedural miscarriages in a biased environment which taken together deprived CDA of its constitutionally protected right to due process of law; and (4) the failure of the District Court to provide any reasons for its action, thus jeopardizing CDA's opportunity to obtain adequate review of many of the issues argued at the District Court level. These contentions are more fully set out in Respondent-Appellant's brief which is a part of the record below.

> Commission's repeated pleas to *amend* the law to make the contribution limits applicable; Congress' limited response to such pleas, which addressed only the reporting issue; and, finally, *Buckley's* judicial gloss limiting the definition of "political committees" which could constitutionally be regulated—compels us to conclude that the Commission lacked subject matter jurisdiction over allegations that groups seeking only to "draft" Senator Kennedy to become a "candidate" some time in the future have violated the contribution limitations of FECA.[11]

Second, it found that in the absence of jurisdiction and a compelling governmental interest, a Court need not lend its authority to enforcement of a subpoena:

> "We conclude that where the Commission seeks judicial enforcement of a sweeping subpoena issued pursuant to an unprecedented investigation which intrudes upon centrally important First Amendment associational and advocacy interest, and where the FEC's assertion of jurisdiction to conduct the investigation rests solely upon a legal interpretation of a statute without any need for additional facts, then it is essential for a Court to assure itself affirmatively that the investigation is within the Commission's subject matter jurisdiction." Pet. pp. 20a-21a.

The Court then suggested that if the FEC wishes to proceed on another jurisdictional basis, e.g. that CDA was operating on behalf of candidate Kennedy, it was free to do so by following a two-step process—first to establish jurisdiction (the nexus with candidate Kennedy) and then by issuing a broader subpoena. Pet. p. 37a.

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[11] Petition of Federal Election Commission for Writ of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit, August 14, 1981, (hereinafter "Pet.") p. 34a.

REASONS WHY A WRIT SHOULD NOT ISSUE

A Writ of Certiorari should not issue in this case because (1) relevant provisions of FECA were amended after the events that are here at issue; (2) the decision of the Court of Appeals is interlocutory in nature; (3) the Court of Appeals correctly determined that the FEC lacked jurisdiction over draft activities prior to 1980; and (4) the Court of Appeals exercised its discretion consistent with judicial precedent in refusing to permit enforcement of an FEC subpoena which probed constitutionally protected activities over which the Commission had no jurisdiction.

1. *This Court should not consider the questions presented by this case in this context or at this time as the statute here in issue has been amended.* Courts should, if at all possible, avoid declaring legislation unconstitutional. This consideration may well lead the Court to rule on narrow statutory grounds, but such a ruling will be without import beyond the unique circumstances of this case as Congress has subsequently amended the law here in issue. FECA was amended by Public Law 96-187, the relevant provisions of which became effective January 8, 1980—well after the draft activities and Commission proceedings here in issue had transpired. The amendments changed the reporting requirements under FECA so as to ostensibly include committees other than those supporting candidates and changed the procedural rules applicable to Commission proceedings so as to ensure the subject of an investigation a more structured opportunity to show why no action should be taken *before* an investigation begins.[12] Had such an opportunity been made available to CDA, it is entirely possible that this litigation would never have arisen.[13]

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[12] 2 U.S.C. § 437g(a)(3); *see* H.R. Rep. No. 96-422, 96th Cong., 1st Sess. at 20 (1979).

[13] *See* p. 6, *supra*; the Commission did not consider CDA's arguments prior to issuing its Order to Produce.

As noted earlier, the gravamen of the Carter-Mondale Committee and FEC complaints were that CDA was "affiliated" within the meaning of FECA (not an illegal status even for those subject to the Act) and that it had *failed to report its affiliation.*

In late 1979, in a limited response to repeated pleas by the Commission to amend FECA by bringing draft activities within its purview,[14] Congress did amend a companion reporting requirement (that required disclosure of contributions and expenditures) in a manner apparently intended to encompass draft activities.

The section read during the period of the conduct here in question:

> Except as provided by paragraph (2), each treasurer of a political committee *supporting a candidate or candidates* for election to Federal office, and each candidate for election to such office, shall file with the Commission reports of receipts and expenditures on forms to be prescribed or approved by it. 2 U.S.C. § 434 (amended 1980). (Emphasis added.)

Congress responded by deleting the reference to candidates so that the section now reads:

> "Each treasurer of a political committee shall file reports of receipts and disbursements . . . . ." 2 U.S.C. § 434.

The new reporting section also contains specific requirements for the reporting of transfers between affiliates. *Id.* §§ 434(b)(2)(F), 434(b)(3)(D) and 434(b)(4)(C).

The House Administration Committee report accompanying the 1979 amendments explained its view of the deletion of the reference to candidates:

> 1) *Reporting Obligation.* Each treasurer of a political committee is required to file reports of receipts and disbursements. Under the current Act, *only treasurers of a political committee supporting*

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[14] *See* pp. 14-15, *infra.*

> *a candidate or candidates were required to file.* The *change was made to ensure that organizations set up to draft individuals who are not actually candidates will be required to report.*" H.R. Rep. No. 96-422, 96th Cong., 1st Sess. at 15 (1979). (Emphasis added.)

Were Petitioner's request granted, it is quite probable that resolution of the questions presented would hinge on a judicial construction of the coverage of the statute.[15] The Court would find itself construing sections of the statute which have since been amended. Alternatively, were the Court to address the constitutional issues raised by governmental intrusion into pre-candidacy activities, it would do so without benefit of Congress' latest word on the subject and the legislative record or lack of it supporting the most recent changes.

2. *The Court of Appeals decision is in part interlocutory in that the Commission is free to continue its investigation under new guidelines.* Only in exceptional cases should a Writ of Certiorari be granted on interlocutory issues. *American Construction Co. v. Jacksonville T&K Railroad Company, 148 U.S. 372* (1893); *Estelle v. Gamble*, 429 U.S. 97, 114 (1976) (Stevens J. dissenting). It should be reemphasized that the Court of Appeals has not closed down the Commission's investigation, but has merely directed it to proceed in a two step fashion if it so chooses. It may conduct a more limited investigation to determine when Senator Kennedy became a candidate and whether or not any of the activities conducted by CDA or the other groups were carried out during that period, or if the activities were conducted in connection with the Senator or his representatives. Having thus established jurisdiction, the committee could then proceed to investigate further aspects of CDA's activities.

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[15] Constitutional issues are to be avoided if doubts can be resolved through interpretation of a statute. *United States v. Rumely*, 345 U.S. 41 (1953).

3. *Activities by issue-oriented groups to induce a compatible, electable public figure to become a candidate for federal office were not subject to FECA.* The FEC has attempted to argue that "draft" activities do indeed fall within its purview through misleading, selective quotations from the legislative history [16] and by a confusing mesh of words which is inconsistent with statutory definitions and the pronouncements of this Court. For example, the Commission speaks of the draft groups as organizations "seeking the Presidential nomination for an *undeclared candidate*, Edward M. Kennedy" [17] and of "committees which advocate the nomination of *undeclared candidates*." [18] (Emphasis added.) An "undeclared candidate" is, as the statute itself provides, one who has either accepted contributions or made expenditures on his own behalf or has authorized others to do so even though he may have made no public announcement or taken steps to place himself on a ballot; [19] it is *not* an individual who has not yet committed to a race and who has given no authorization to anyone to act on his behalf in seeking nomination to office.

The more serious deficiency in the Commission's position, however, is that it completely ignores the judicial

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[16] The Commission points to the use of the word "person" in the definition of "contributions" and "expenditures". These definitions were included in the original FECA of 1971 and were carried forward from previous law. While the use of the term "person" might imply a broader meaning, the relevant committee reports unequivocally indicated that the sums so accepted (contributions) or expended must be with reference to "candidates" for federal office. S. Rep. No. 92-96, 92nd Cong., 2d Sess. at 41-42 (1971); S. Rep. No. 92-229, 92nd Cong., 2d Sess. at 65 (1971); *id.* at 121 (supplemental views of Sen. Prouty *et al.*).

[17] Pet. p. 4.

[18] *Id.* at 5.

[19] 2 U.S.C. § 431(b) (amended 1980); *see also, id.* § 431(19) which sets forth the tests which must be met for an expenditure to qualify as an independent expenditure.

gloss placed upon FECA by the courts, the Commission's own pronouncements with respect to the construction of the Act, and the Congress' response (or lack of it) to this gloss and to the Commission's repeated pleas to amend the Act so as to bring precandidacy, draft activities within its purview.

This Court, in upholding the disclosure provisions of FECA in *Buckley v. Valeo*, 424 U.S. 1 (1976), articulated three governmental purposes which justified the incidental curtailment of associational freedom thereby entailed.[20] The Court made clear that these purposes were served only in the context of campaigns by candidates for federal offices and that attempts to cast the net wider were not justified by governmental interests sufficient to override the attendant infringement of associational rights. For example, in discussing the ceiling on independent expenditures (which it declared invalid), the Court recognized and adopted the narrow construction given to the phrases "for the purpose of influencing an election", "contribution" and "expenditure" by lower courts in *Buckley* as well as in *United States v. National Committee for Impeachment*[21] and *ACLU v. Jennings*.[22] 424 U.S. at 23, note 24.

Later, in discussing the so-called "independent expenditure" provisions, the Court noted that

> "contributions and expenditures are defined in parallel provisions in terms of the use of money or other valuable assets for the purpose of influencing the nomination or election of *candidates* for federal office." *Id.* at 78. (Emphasis added.)

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[20] These were (1) the need to inform the electorate about the sources and dispositions of funds spent by candidates; (2) the need to deter corruption by publicizing large contributions to and expenditures by candidates; and (3) the necessity to gather data to police the contribution limitations. 424 U.S. at 66-68.

[21] 469 F.2d 1135 (2nd Cir. 1972).

[22] 366 F. Supp. 1041 (D.D.C. 1973), *vacated as moot sub. nom. Staats v. ACLU*, 422 U.S. 1030 (1975).

Only as thus defined do the limitations "have a sufficiently close relationship to the goals of the Act where they are *connected with the candidate or his campaign*". *Id.* at 79. (Emphasis added.) The Court went on to define a "political committee" to

> "encompass organizations that are *under the control of the candidate or the major purpose of which is the nomination or election of a candidate.*" *Id.* at 80. (Emphasis added.)

In the same vein "expenditures" were narrowly construed

> "to reach only funds used for communications that expressly advocate the election or defeat *of a clearly identified candidate*". This reading is directed precisely to that spending that is *unambiguously related to the campaign of the particular federal candidate.*" *Id.* at 81. (Emphasis added.)

This interpretation has been consistently followed by courts since *Buckley*. *See FEC v. American Federation of State, County and Municipal Employees*, 471 F. Supp. 315, (D.D.C. 1979); *FEC v. Central Long Island Tax Reform Immediately Committee*, 616 F.2d 45 (CA2, 1980). *See also First National Bank of Boston v. Belotti*, 435 U.S. 765 (1978).

At least as teling are the Commission's own pronouncements. In its 1976 report to the Congress for the year 1975, the Commission urged that "thought should be given to amending the law to make the contribution limitations applicable to draft movements." Pet. p. 74a. (The Act was amended extensively in 1976, but no such modifications were made). Similarly, in its 1977 report the Commission suggested that Congress "may wish to consider amending the Act to bring draft movements within the reporting provisions and contribution limitations". In 1978 and 1979 the Commission reiterated its

requests of the previous years.[23] In 1979, as noted earlier, Congress did act on the Commission's recommendations, and a relevant provision apparently requiring reports from political committees which were not supporting candidates was added as of January 8, 1980.[24] But in so doing, at least one Congressional committee acknowledged what the Commission had been saying consistently for years: draft activities were not covered by the Act.[25]

4. *The Court of Appeals correctly concluded that jurisdictional and constitutional questions may be considered in enforcing a FEC subpoena.* FECA declares that the Federal Courts "may . . . in case of a refusal to obey a subpoena or order of the Commission . . . . issue an order requiring compliance." 2 U.S.C. § 437d(b). Petitioner contends that in the circumstances of this case, the Court acted improperly in considering jurisdictional questions in the context of a subpoena enforcement proceeding. Pet. p. 10 *et seq.*

Petitioner suggests that the Court of Appeals inquiry is inconsistent with *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946), *United States v. Morton Salt* 338 U.S. 632 (1950), and a long line of cases adopting similar position which, according to Petitioner, make inquiries of the nature here conducted impermissible.

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[23] It was only *after* the draft Kennedy movement surfaced that the Federal Election Commission changed its approach in the 1980 and 1981 reports for the years 1979 and 1980 respectively. See Pet. pp. 76A-77A.

[24] While this change in FECA apparently required draft groups to comply with reporting requirements, as the Court below put it, "not even a whisper about limiting contributions to draft groups has ever been heard in the legislative history of FECA; it is therefore clear that Congress has never acted expressly to bring draft groups within th coverage of contribution limitations." Pet., p. 34A.

[25] H.R. Rep. 96-422, *supra* at 15.

Petitioner further suggests that any deviation from what it perceives to be the holdings of the aforementioned line of cases, would result in a dangerous shackling of its investigatory and adjudicatory powers which could result in the enforcement of FECA being thrown entirely into the courts contrary to congressional intent. Pet. pp. 15-16.

Petitioner's anxieties are misplaced. First it mistakes the status of current law; second, it ignores the highly qualified nature of the Court of Appeals ruling, including the pivotal element that the jurisdictional question here turned solely on an interpretation of law and not of fact (Pet. pp. 19a-20a); and third, the Commission ignores the fact that a comparable set of circumstances will only rarely, if ever, occur in its enforcement proceedings so that it need not fear day-to-day disruption of ordinary complaints made with respect to political activities which are clearly in its domain of regulation.

As the Court of Appeals noted,[26] in the cases cited by Petitioner for its position, there are strong and clear indications that a review of the kind undertaken in these subpoena enforcement proceedings would be fully warranted, even absent the special First Amendment sensitivities raised by the nature of the FEC's task. For example, the *Oklahoma Press* court repeatedly emphasized that a court asked to enforce an agency subpoena could legitimately inquire into the statutory authority of the agency to conduct the investigation.[27]

In the D.C. Circuit the doctrine of judicial deference to agency determinations of jurisdiction is subject to exceptions; one is where there is a patent lack of jurisdiction. *CAB v. Deutsche Lufthansa Aktiengellschaft*, 591 F. 2d 951, 952 (D.C. Cir 1979). In the Seventh Circuit examination of jurisdictional issues is routine

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[26] Pet. pp. 8a-12a.

[27] *Oklahoma Press, supra*, at 208, 209, 213, 216 and 217 (n. 57).

where factual determinations and agency expertise are not involved. *See* Pet. pp. 19a and 20a, note 19.

Moreover, where First Amendment issues are implicated a long line of cases has established firmly that a compelling governmental interest must be demonstrated to justify intrusions into constitutionally protected areas of political activity and association, and that courts will not hesitate to intervene in an investigatory process where such issues are legitimately raised. *U.S. v. Rumely*, 345 U.S. 41 (1953); *Watkins v. United States* 354 U.S. 178 (1957); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *NAACP v. Alabama*, 357 U.S. 449 (1958); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *De Gregory v. Attorney General of New Hampshire*, 383 U.S. 825 (1966); *Pollard v. Roberts*, 283 F. Supp. 248 (E.D. Ark.), *aff'd* 393 U.S. 14 (1968); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971). *Pollard*, for example, involved an attempt by a Democratic prosecutor to investigate alleged Republican vote-buying by subpoenaing records which would reveal information concerning not only expenditures (vote-buying), but contributions and the identities of individual contributors. In circumstances where state law did not require disclosure of contributions, the Court, after discussing the *Morton Salt* line of cases, concluded that stiffer tests must be met when First and Fourteenth Amendment rights were involved, and that disclosure could only be compelled when "there is a rational connection between such disclosure and a legitimate governmental end, and that the governmental interest in disclosure is cogent and compelling." 283 F. Supp. at 256-57. Absent statutory coverage (as is the case here), the Court found no such interest and refused to enforce the subpena.

It should also be noted that in the context of FEC proceedings both the Congress and the courts have explicitly recognized, in cases other than the present one, that more

careful scrutiny is warranted. Thus, the Congress made special provision for appeal of constitutional issues raised by the statute,[28] and as this Court recently recognized, did not limit the availability of this special mechanism to individuals not subject to an investigation, even though the results of an appeal might delay the investigatory proceedings. *California Medical Association et al. v. FEC*, 49 U.S. L.W. 4842 (1981).[29] Other Courts of Appeal have not hesitated to consider constitutional issues aised in the context of subpoena enforcement proceedings stemming from FEC investigations, without regard to the potentially disruptive nature of such considerations to the conduct of the investigation (*see Lance v. FEC*, 617 F.2d 365 (5th Cir. 1980)), and two lower courts have required the Commission to adopt a two-pronged sequential investigatory process: one aimed at establishing whether or not the activities to be investigated fell within the ambit of the Commission's authority, and the second dealing with the merit of the particular matter to be investigated. *Reader's Digest Association v. FEC*, 509 F. Supp. 1210 (S.D.N.Y. 1981); *FEC v. Phillips Publishing, Inc.*, Misc. No. 81-0079, D.D.C., July 16, 1981. It is precisely such a procedure which the court below left open for the Commission to pursue Pet. pp. 35a-37a.

The Court of Appeals ruling in this case is not a general one with widespread applicability; it rested upon a combination of factors which are highly unlikely to recur but which argued persuasively, in this instance at least,

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[28] 2 U.S.C. § 437h.

[29] The dissent of Justice Stewart, in which the Chief Justice and Justices Rehnquist and Powell joined, did not question the propriety of making appropriate procedures available for challenge of Commission action during an investigation, but rather suggested that these were to be governed by a companion provision, 2 U.S.C. § 437g—the section pursuant to which this enforcement proceeding was brought.

for challenging the FEC's conduct. Beyond the Court's general duty to assure itself that matters being investigated are within the statutory jurisdiction of the investigating agency, the Court found other factors which make it "especially important" for an enforcing court to exercise "particular care" in assuring itself that jurisdiction in fact exists. Pet., pp. 12a. It noted that the investigation was an unprecedented assertion of subject matter jurisdiction by the FEC; that the FEC oversees behavior of individuals and groups only insofar as they act, speak, and associate for political purposes, and, that the FEC unlike the FTC and similar agencies, has no roving statutory investigation function.

The Court further noted the nature of the subpoena itself: the materials requested were in "the very heart of the organism which the First Amendment was intended to nurture and protect." Pet. p. 15a. It noted that the subpoena requested *all* materials and listings of *every* official, employee and volunteer of the group together with their telephone numbers and records concerning communications among various groups. The court found that it was not without importance that the request was ordered by a Federal agency whose members are nominated by the President and was made with respect to groups whose avowed purpose was to defeat the President by encouraging another popular figure to run against him. Pet. p. 16a.

Thus, the Court's ruling states no more than that the FEC will face court examination of its investigatory process where it is asserting jurisdiction into an area in which it had previously not attempted to assert such jurisdiction, where a determination of law and not fact is required and where its request for information is sweeping and intrusive into highly sensitive political expression and association. It might be noted in particular that it is highly unlikely that the Commission is

again going to find itself seeking to assert jurisdiction over an area for which it had for years, unsuccessfully, sought Congressional authority to regulate.[30]

If the Commission's concern is that it will be unable to investigate activities on behalf of an undeclared candidate which would put declared candidates at a great disadvantage, it will have ample opportunity in this case (as well as in others) to determine when an individual has become constructively a candidate, and to link the efforts of so-called draft groups with those of such a candidate. Indeed, FECA itself addresses this possibility and provides workable standards. A candidate is defined to include, *inter alia*, one who has ". . . *given his consent for any other person* to receive contributions or make expenditures, with a view to bringing about his nomination for election, or election [.]" 2 U.S.C. § 431(b)(2).

Thus, the Commission concerns over wholesale disruption of the political process (Pet. p. 5) should be ignored, for no such result is likely to follow. Indeed Courts have long recognized that issue-oriented groups not tied to a candidate may operate free of control by the FEC, even where their activities may burden or befriend the campaigns of particular officeholders.[31] In *Buckley*, this Court pointed to the specific evils attendant upon financial contributions to *candidates* (corruption or the appearance of corruption), which could justify intrusions and limitations upon activities normally protected by the First Amendment from government interference. This Court, and others, have noted that where this nexus does not exist, such intrusion is not justified.[32]

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[30] *See* pp. 14-15, *supra*.

[31] *See National Committee, supra*.

[32] *See* p. 13 *et seq.*, *supra*.

The Commission in this case is again [33] seeking to ignore this distinction and seems determined instead to reach out, as far as it can, to bring—even without the consent of Congress—citizens engaged in protected activity within the constricting ring of its regulatory embrace. Moreover the Commission is claiming that its reach cannot be subjected to judicial scrutiny except upon the conclusion of its investigatory processes. The Commission's position in this respect is clearly wrong and it does not deserve serious consideration by this Court—draft activities were not covered by FECA in 1979 and courts may, legitimately, restrict Commission investigations into constitutionally protected areas which are outside of the FEC's jurisdiction.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the Commission's Petition should be denied.

ROBERT REED GRAY *
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[33] *See FEC v. American Federation of State, County and Municipal Employees, supra*; *FEC v. Central Long Island Tax Reform Immediately Committee, supra.*

APPENDIX A

CARTER/MONDALE PRESIDENTIAL COMMITTEE, INC.
1413 K Street, N.W., Washington, D.C. 20005
(202) 789-7200

Robert S. Strauss, Chairman
Tim Kraft, National Campaign Manager
S. Lee Kling, Treasurer
Evan S. Dobelle, National Finance Chairman

June 18, 1980

Honorable Max Friedersdorf
Chairman
Federal Election Commission
1325 K Street, N.W.
Washington, D.C. 20463

Dear Mr. Chairman:

In October, 1979, the Carter-Mondale Presidential Committee, Inc. ("CMPC"), filed a complaint against the political action committee of the International Association of Machinists and Aerospace Workers and various "draft-Kennedy" committees alleging violations of certain contribution and expenditure limitations of the Federal Election Campaign Act of 1971, as amended ("the Act").

I understand that most, if not all, of these committees have terminated their activity. Further, the CMPC has no evidence whatsoever of any continuing violations of the Act or of any meaningful relief that could be granted almost nine months after the complaint was filed and after the primaries have concluded.

Thus, I was concerned to learn that the Commission staff is now taking the depositions of officials of the Kennedy for President Committee in connection with this matter.

In our view, there is now little to be gained by pursuing the CMPC's complaint at this juncture.

Accordingly, this is to request formally that the CMPC's complaint against all parties named in its original filing of October 4, 1979, and the amendment thereto dated November 3, 1979, be withdrawn and that further investigation and review by the Commission be ended. I am aware of the workload and shortage of Commission staff, and believe that a closing of this matter would free them and the Commission for more productive work in connection with the 1980 general election.

I appreciate your courtesy in considering this matter.

Sincerely,

/s/ Robert S. Strauss
ROBERT S. STRAUSS
Chairman

cc: Charles N. Steele, Esq.
General Counsel

Opposition

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Office-Supreme Court, U.S.
FILED
SEP 9 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-299

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FEDERAL ELECTION COMMISSION,
Petitioner,
v.
MACHINISTS NON-PARTISAN POLITICAL LEAGUE,
Respondent.

FEDERAL ELECTION COMMISSION,
Petitioner,
v.
CITIZENS FOR DEMOCRATIC ALTERNATIVES IN 1980,
Respondent.

BRIEF IN OPPOSITION OF MACHINISTS NON-PARTISAN POLITICAL LEAGUE, RESPONDENT

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the 1979 efforts of respondent, Machinists Non-Partisan Political League, to draft Senator Edward Kennedy to become a candidate for the Presidency of the United States were subject to the Federal Election Commission's subject matter jurisdiction.

2. Whether subpoenas issued by the Commission to inquire into candidate draft activities should be enforced by the courts even if the Commission has no jurisdiction over such activities.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 81-299

FEDERAL ELECTION COMMISSION,
Petitioner,

v.

MACHINISTS NON-PARTISAN POLITICAL LEAGUE,
Respondent.

FEDERAL ELECTION COMMISSION,
Petitioner,

v.

CITIZENS FOR DEMOCRATIC ALTERNATIVES IN 1980,
Respondent.

BRIEF IN OPPOSITION OF MACHINISTS NON-PARTISAN POLITICAL LEAGUE, RESPONDENT

Petitioner has set forth no reason for granting the writ. The decision below scrupulously follows the applicable decisions of this Court in every area and there is no conflict among the circuits. Furthermore, the unanimous opinion of the Court of Appeals is clearly correct; the FEC has no jurisdiction or authority over "draft" efforts and FEC subpoenas to inquire into such draft efforts are not enforceable by the courts. We believe a more complete statement of the facts than petitioner's truncated version will assist the Court in evaluating the decision below.

COUNTER-STATEMENT OF THE CASE

1. The Candidate-Draft Activities in Issue [1]

The involvement of respondent MNPL, the political arm of the International Association of Machinists Union, in the draft-Kennedy efforts had its genesis in September of 1978 long before the beginning of the draft-Kennedy efforts and the acceptance of candidacy by President Carter and by Senator Kennedy. MNPL and IAM had supported the election of President Carter in 1976, but had grown increasingly disenchanted with his economic and other policies deemed antithetical to the interests of the membership of the IAM and to working people and citizens throughout the nation. As early as September 8, 1978, IAM President Winpisinger made a major address assessing the American economy and the state of the nation. Following a lengthy review of issues and the growing influence of the corporate sector, President Winpisinger concluded with the following:

> "President Carter has abandoned his constituency, his party's platform, and his own campaign pledges. Carter may be the best Republican President since Herbert Hoover. Look at his record. He's done nothing for full employment, simply continued the Nixon/Ford program for unemployment. He's done nothing to curb inflation, but continue the Nixon/Ford policy of scape-goating labor as the culprit. He sold out consumers, workers and the poor on the energy bill. He's surrendered to the energy octopus.
>
> Carter has done absolutely nothing to get national health insurance. He's hedged his pledge with a piecemeal plan that would allow the insurance and medical leaches to make certain it would be stillborn.
>
> He also did precious little to break the filibuster on labor law reform. I didn't see him publicly flog

[1] The facts here set forth appear in the verified Motion to Dismiss filed by respondent with the Commission on November 26, 1979, and with the District Court on February 5, 1980 as Attachment A to respondent's Opposition. The (J.A.) references are to the Joint Appendix in the Court below.

anybody the way he was publicly flogging people on the energy bill when it came to labor law reform. I didn't see him deliver either Georgia Senator's vote for cloture. If I were the ex-governor of Georgia and the President of the United States, I'd have some kind of whip to crack to get at least one of their votes. One vote would have made the difference.

He named a corporate conservative by the name of Bill Miller to the Chairmanship of the Federal Reserve Board. So the old Nixon/Ford right wing monetary policies of high interest rates, tight money, and secret monetary deliberations continues right on with no abatement.

He hasn't done a thing to change free trade to fair trade. He continues to misdirect his human rights sanctions against exports rather than imports. He has needlessly heated up the cold war in a chest-beating effort to improve his image.

Carter has done zilch for honest tax reform, which has to be our cry; next to nothing for the cities; zip point zero for public employees and government workers.

President Carter—to me—is through. He is a weak, vascillating and ineffective President. I know as well as anyone, that those are dangerous words. I also know how easy it is for an incumbent-sitting president to launch some spectacular and recoup his image almost overnight. This guy had the opportunity to become a fresh, young leader with a resolve and a drive to lead this country out of the Nixon/Ford aftermath. Labor was with him, liberals were with him, blacks, women, Chicanos, the Jewish community, even the Congress. One by one he betrayed every one of them. His humanitarianism, if he ever had any, has vanished. . . ."

This statement was followed within a few weeks by a press conference of September 25, 1978, where President Winpisinger declared that Carter "does not merit our support, because he has abandoned his party's principles, platform, campaign pledges and the constituency

which put him in office." President Carter, however, continued to take positions on energy deregulation and other issues which IAM deemed opposed to the interests of its members. Consequently, commencing in February of 1979, the IAM through activities by President Winpisinger, by MNPL, and by local IAM officials, began to encourage and assist in the formation of draft-Kennedy groups in several states. Between May 9 and October 1, 1979—all before Senator Kennedy became a candidate in late October, 1979—MNPL gave approximately $30,000 to draft-Kennedy groups in seven states: donations in Iowa given by payments on May 9 and August 30; donations in Florida given by payments on July 9 and August 21; donations in Illinois given by payments on July 9, August 2, and September 11; donations in New Hampshire given by payments on July 9 and August 3; a donation in Indiana given on August 21; a donation in Wisconsin given on September 14; and a donation in Hawaii given on October 1.

In providing such support to draft-Kennedy groups it was the purpose to promote the acceptance of Presidential candidacy by Senator Kennedy. That purpose was reflected in President Winpisinger's "National Call for Kennedy" letter, widely disseminated by that organization in the summer of 1979. That communication opened by stating that "you and I simply must find a way to convince Senator Edward Kennedy to run for the Presidency next year," and went on to explain that a grass roots draft effort calling on the Senator to announce as a candidate could be successful in convincing the Senator to "come forward and accept the people's draft"; then the Committee would cease to exist because "we would have achieved our goal." Respondent MNPL understood that the draft-Kennedy committees in seven states, to which MNPL made contributions, were similarly organized and directed to the goal of inducing the Presidential candidacy of Senator Kennedy, undertook no election activity, and ceased operations in October when the Senator became a candidate.

The first state group formed was the Iowa "Committee for Alternatives to Democratic Presidential Candidate," organized on March 31, 1979 with major support from IAM officials and contributions from MNPL. The group's declared purpose was "to explore the alternatives for a democratic presidential nominee," and its organizing document went on to state that the Committee would be disbanded "whenever Senator Ted Kennedy makes a formal announcement of his candidacy" or forms an authorized political committee.

In Illinois the predecessor of the Illinois Citizens for Kennedy was the Committee on Illinois Government, which organized in June of 1979 for the purpose of "calling upon Senator Edward M. Kennedy to run as a candidate of the Democratic Party for the office of President of the United States", with the commitment that "a petition drive to support this effort will be initiated." These efforts were soon merged in the Illinois Citizens for Kennedy (to which MNPL made a contribution), whose brochure stated that:

> "Illinois Citizens for Kennedy was formed following a public meeting June 4, 1979 convened by the Committee on Illinois Government (CIG), where a number of labor leaders, community spokes-people, and elected officials pointed out the broken promises of the Carter Administration and urged Senator Kennedy to seek the nomination."

Similar in character was the Indiana draft-Kennedy Committee to which MNPL made a contribution. The Committee circulated a petition addressed to Senator Kennedy asking him to "announce your candidacy for the Presidency of the United States."

Similar, too, was the "Wisconsin Democrats for Change in 1980," to whom MNPL made a contribution. The Committee pledged to work for "an uncommitted delegation which shares our common aspirations and which

would declare for a socially progressive leader—like Senator Edward M. Kennedy—when such a candidate comes forward."

The "New Hampshire Democrats for Change" to which MNPL made a contribution had the same purpose and function. The Committee circulated a postal "draft card" to be sent to Senator Kennedy containing the message "We Want You."

Likewise the "Florida for Kennedy" committee to which MNPL made a contribution highlighted "the compelling reason to draft Senator Kennedy," and focused upon the straw ballot on November 18 as the foundation of a "movement designed to publicly mandate Senator Kennedy to accept a draft to be the Presidential Nominee of the Democratic Party." The election of delegates who would participate in the November straw vote was stated by the Committee to be "the key to convincing Senator Edward Kennedy to announce." The Committee's letters called for support to "indicate to Senator Kennedy" his success chances in 1980.

The last of the seven committees which received MNPL contributions was Hawaii Democrats for Kennedy, organized in September of 1979. Although the organization was formed too late to undertake any significant activity before Senator Kennedy became a candidate, IAM contributed in the belief that, similar to the other six committees, it would promote efforts to induce Senator Kennedy to accept candidacy.

Thus, it is entirely clear that both respondent MNPL and the draft committees in the various states supported by MNPL engaged only in pre-candidacy activities. The Commission's use of phrases like "contributions to committees seeking the presidential nomination for an *undeclared candidate*" (Pet. p. 4) and "contributions to committees which advocate the nomination of *undeclared*

candidates" (*Id.* at 5) (emphasis supplied), is wholly unwarranted. Throughout this entire 1979 draft Kennedy movement supported by MNPL, Senator Kennedy was *not* a candidate, declared or *undeclared*, and the Commission does not argue that he was or offer any evidence to that effect. The case at bar concerns *pre-candidacy* activities pure and simple, as does the ruling of the Court below (see p. 14, n. 2, *infra*).

2. The Commission Proceedings in This Case

On October 4, 1979—after the MNPL made its draft-Kennedy contributions and before the Senator had become a candidate—the Carter-Mondale Campaign Committee filed a sworn complaint with the FEC. It asserted that draft-Kennedy groups in several states were "affiliated" with each other, and that therefore respondent MNPL (which gave in total some $30,000 to these groups) had exceeded the $5,000 limit of the FECA on contributions to any "political committee." The complaint nowhere alleged that Senator Kennedy was a candidate at the time of the challenged MNPL contributions to the draft-Kennedy committees. Nevertheless, on October 19, 1979, the Commission, acting under 2 U.S.C. § 437g(a)(2), issued a "reason to believe" notice to respondent that the Act may have been violated. The "reason to believe" notice was exclusively based on a complaint which failed to assert any candidate or candidacy for office which is a precondition to the application of the statute and thus of the Commission's jurisdiction. Although this Court had expressly ruled in *Buckley* v. *Valeo*, 424 U.S. 1 at 79 that a "political committee" subject to the limitations of the statute is only an organization "*under the control of a candidate or the major purpose of which is the nomination or election of a candidate*," the Commission instituted these proceedings on October 19, 1979 directed to the pre-candidacy operations of the Kennedy draft committees.

Undersigned counsel were retained on October 30 to represent respondent MNPL. With the short time set for respondent's answer to the Commission's "reason to believe" notice about to expire, on October 31 the Commission was asked by counsel to provide ten additional days for the filing of the MNPL response. Nevertheless, by a communication of November 8th the request for additional time was effectively denied, the Commission requiring filing of respondent's response that same day; no explanation was given by the Commission for its precipitate action.

Meanwhile, on November 5, without awaiting the respondent's answer to the "reason to believe" notice (or even referring to the pending request for a few days' time for filing that answer), the Commission issued a sweeping order to respondent to produce all documents in its possession and in the possession of any of its hundreds of employees concerning draft-Kennedy activities and contributions at any time in 1979 (JA 4). On November 8 counsel wrote to request that the subpoena be suspended until the Commission could consider the MNPL response on the merits and then determine what order to produce was still appropriate. The Commission (by an order mailed on November 14) denied that request, again without explanation.

Since the period for motions to quash provided in Commission Regulations (§ 111.13) was up on November 14 and no response had been received by that time to the request that the subpoena be suspended, respondent filed a motion with the Commission on that date to quash or modify the subpoena for jurisdictional and other reasons (JA 8). Most important of all, on November 26, 1979, respondent filed a "Motion to Dismiss Pending Complaint Against the MNPL and Supporting Memorandum," documenting the absence of Commission authority over precandidacy activities to induce Senator Kennedy to become

a candidate (Attachment A to respondent's Opposition in the District Court). In view of the important constitutional and statutory issues involved in the question whether the Commission's jurisdiction extends to draft movements, counsel delivered the motion to each Commissioner's office stating that "we believe the constitutional and statutory issues raised in the motion of such importance to warrant an exception to the Commission's general practice and request that oral argument be heard on the motion." Nevertheless, on the very next day (November 27, 1979) without resolving the Motion to Dismiss, and still without explanation, the Commission denied the November 14th motion to quash or modify its disclosure order.

On November 30 counsel responded to the Commission as follows:

> "On November 27, 1979, according to your letter, the Commission voted to deny the motion of MNPL to quash or modify the Commission's subpoena. The Commission could not have considered the motion to dismiss and the supporting brief concerning its lack of jurisdiction at that time.
>
> Because the Commission did not give any reason for its denial of the motion to quash or modify, as it has not given any reason for any of its earlier actions in this matter, we are at a loss to know what the denial of the motion to quash or modify actually means. Certainly, if the Commission has no jurisdiction over the draft-Kennedy movement, as the motion to dismiss and supporting brief make clear, no subpoena can properly issue."

A letter of reply from the Commission dated December 14 made clear the investigation would come first, and thereafter the decision whether draft activities were within the Commission's subject matter jurisdiction:

> "The Office of General Counsel is in receipt of your letter and supporting memorandum dated November 26, 1979, in which you request that the Commission dismiss its investigation against the Machinists Non-Partisan Political League (MNPL). The Office of General Counsel is also in receipt of your letter of November 30, 1979, which also pertains to your request that MNPL be dismissed from the Commission's investigation.
>
> As you know, 2 U.S.C. § 437g(a)(4) directs the Commission to afford any respondent a reasonable opportunity to demonstrate that no action should be taken. The Commission will, as a part of its investigation as to whether there is reasonable cause to believe that the Act has been violated, consider MNPL's letter and memorandum dated November 26 as well as any other submission which MNPL desires to make. The specific jurisdictional arguments set forth in your memorandum will be addressed by the Commission in the course of that process."

A January 21, 1980 letter to counsel from the Commission's General Counsel went one step further and announced that "there are no provisions in the Act which designate a procedure whereby the Commission may . . . rule on a Motion to Dismiss for lack of jurisdiction."

3. The Judicial Proceedings in This Case

Without further Commission rulings or explanations and while the Commission still had before it an unresolved motion challenging its authority over candidate-draft activities, on December 28, 1979, the Commission filed suit in the District Court under 2 U.S.C. § 437d(b) to compel respondent's compliance with its sweeping subpoena. Respondent objected on the ground that the Commission has no jurisdiction over the subject of the subpoena and that in this sensitive First Amendment area, where the

Commission has to show compelling need for the information it seeks, it had not shown or even found jurisdiction over the candidate draft activities in issue. The District Court, however, on January 30, 1980, rubberstamped the Commission's subpoena demand, holding that the absence of FEC jurisdiction is no defense to judicial enforcement of its subpoena (J.A. 13-17). Respondent's First Amendment objections were also rejected, apparently under the view (J.A. 13-14, 61) that since the statute grants the Commission investigative power over federal elections, this is *ipso facto* a "compelling interest" in anything the Commission wants to know about political action in America.

Respondent MNPL appealed and on May 19, 1981 a unanimous Court of Appeals vacated the District Court order. The Court of Appeals ruled that in the circumstances of this case the District Court should have assured itself of the Commission's subject matter jurisdiction before acting, stating:

> ". . . we conclude that where the Commission seeks judicial enforcement of a sweeping subpoena, issued pursuant to an unprecedented investigation which intrudes upon centrally important first amendment associational and advocacy interests, and where the FEC's assertion of jurisdiction to conduct the investigation rests solely upon a legal interpretation of a statute without any need for additional facts, then it is essential for a court to assure itself affirmatively that the investigation is within the subject matter jurisdiction of the Commission before lending its authority to enforcement of a subpoena" (Pet. pp. 20a-21a).

The Court then went on to find that there was no such subject matter jurisdiction:

> ". . . it is clear to us that in this case the contribution limitations did not apply to the nine groups whose activities did not support an existing 'candi-

> date,' but merely represented attempts to convince the voters—or Mr. Kennedy himself—that he would make a good 'candidate,' or should become a 'candidate'" (Pet. p. 34a).

The unanimous Court below was clearly correct on both points and there is no warrant for issuance of a writ of certiorari.

REASONS FOR DENYING THE WRIT

In October of 1979, before Senator Kennedy agreed to become a candidate for the Presidential nomination, the Federal Election Commission undertook to assert its authority over contributions which had earlier been made to grass roots draft-Kennedy committees in various states. The repeated objections of respondent that its contributions to the draft-Kennedy organizations could not under any circumstances have violated the statute—because the draft-Kennedy committees were not "political committees" subject to the statute's limitations—were repeatedly shunted aside by the Commission. After the Commission sought judicial enforcement of its subpoena, the ruling of the Court of Appeals sustained respondent's objections to sweeping disclosure demands concerning a subject which was not within the Commission's authority.

In particular the Court of Appeals relied on this Court's *Buckley* ruling that a "political committee" subject to the statute's restrictions encompasses *only* an organization "under the control of a candidate or the major purpose of which is the nomination or election of a candidate." 424 U.S. 1, 79. Carrying out this Court's ruling, the Court below found that the draft-Kennedy groups operating before the Senator became a candidate were not "political committees" subject to Commission authority. Congress having left undisturbed the *Buckley* limitation of "political committee" to organizations supporting a candidate, the lower Court's application of this Court's ruling presents no new issue for resolution.

Nor is there basis for review of the Court of Appeals' refusal to enforce the FEC's subpoena. In this sensitive First Amendment area this Court's repeated rulings confirm that government investigative power cannot unnecessarily intrude upon privacy of political activity and association. Far from compelling necessity, here the absence of Commission authority to regulate candidate draft groups leaves no basis for judicial enforcement of a sweeping Commission subpoena inquiring into the pre-candidacy activities of the draft-Kennedy committees. Only a brief further word about the need for, and absence of, FEC subject matter jurisdiction would seem necessary.

1. *The Need for FEC Subject Matter Jurisdiction.* Even if this federal agency investigation was not directed at disclosure of constitutionally protected political association and activity, the statute's failure to include draft organizations among the "political committees" subject to FECA limitations deprives the FEC of any power to investigate such organizations. As the lower Court's opinion sets forth (Pet. pp. 8a-9a), this Court's seminal *Oklahoma Press* decision long ago ruled that courts will not enforce administrative subpoenas if there is absence of agency subject matter jurisdiction over the activities it is investigating. Unlike *Morton Salt* and its progeny—where agency authority over the subject of the investigation was clear and the issue related only to the extent of the activities of the private party being investigated—here the pre-candidacy conduct of the draft-Kennedy organizations and the contributions to them can in no way provide the missing agency subject matter authority which arises only after candidacy has been accepted.

In any event, here vital First Amendment protections also bar judicial enforcement of an *ultra vires* FEC in-

vestigation. A long line of this Court's cases establishes that there must be the most compelling necessity demonstrated to overcome constitutional privacy of political activity and association where First Amendment activity is under compulsory government investigation. *United States* v. *Rumely*, 345 U.S. 41 (1953); *Watkins* v. *United States*, 354 U.S. 178 (1957); *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957); *NAACP* v. *Alabama*, 357 U.S. 449 (1958); *Scull* v. *Virginia*, 359 U.S. 344 (1959); *Bates* v. *City of Little Rock*, 361 U.S. 516 (1960); *Talley* v. *California*, 362 U.S. 60 (1960); *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Gibson* v. *Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *De Gregory* v. *Attorney General of New Hampshire*, 383 U.S 825 (1966); *Baird* v. *State Bar of Arizona*, 401 U.S. 1 (1971); *In Re Stolar*, 401 U.S. 23 (1971). Thus, for any judicial enforcement of an FEC subpoena demanding wholesale disclosure of the names, expenditures, activities, meetings, discussions and contributions of the draft-Kennedy groups and their supporters, there must be a constitutionally compelling need for disclosure. That need cannot possibly be made out when the statute does not even limit candidate draft activity, leaving the Commission without jurisdiction over the subject of its investigation.[2]

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[2] The Commission urges (Pet. p. 13, n. 13) that the ruling below will require it to establish at the outset of an investigation "without benefit of adequate information" that it has jurisdiction to act. But the ruling below holds only that where the Commission sets out to investigate an organization which is patently not a "political committee" and thus FEC has no jurisdiction, courts will not enforce its subpoena. Presumably almost all of the Commission's investigations *do* involve political committees or candidates and are thus in no way subject to the limited ruling in this case. Moreover, even as far as candidate-draft groups are concerned, the ruling below (Pet. pp. 35a-37a) authorizes the Commission to investigate any claim of a surreptitious relationship which may render what is ostensibly a draft organization in fact a political committee for an undeclared candidate. That is not the case here.

2. *The Absence of FEC Subject Matter Jurisdiction.* This Court's ruling in *Buckley* leaves no room for the Commission's insistence that the statute applied in any way in 1979 to limit the activities of candidate draft groups. *Buckley* (at p. 79), advisedly confined a "political committee" subject to the Act's limitations to an organization "under the control of a candidate or the major purpose of which is the nomination or election of a candidate." This Court went on (at p. 80) to confine "expenditure" for disclosure purposes in the same fashion "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate. This reading is directed precisely to that spending that is unambiguously related to the campaign of a particular federal candidate." [3]

Nor is there any suggestion that after *Buckley* the statutory amendments in effect in 1979 in any way sought to modify or alter this Court's ruling. Far from seeking to modify this Court's limitation of political committees to candidate-support groups, Congress declined in the 1976 FECA amendments to follow the Commission's urging that it include candidate draft groups within the Act's contribution limitation. The Commission's 1975 report had urged that "thought should be given to amending the law to make the contribution limitations applicable to draft movements." The Commission's 1976 report stated again that Congress "may wish to consider amending the Act to bring draft movements within the reporting provisions and contribution limitations." Yet the extensive 1976 amendments included no such contribution

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[3] For two years we have been calling these quoted passages from *Buckley* to the attention of the Commission, but at no time, including the Commission's pending Petition to this Court, has any reason been advanced why those rulings are not conclusive against the Commission's position.

limitation.[4] Instead of any such amendments effective when the Kennedy draft committees were active, even the Commission concedes that "obviously" Congress had not then anticipated "that draft committees would emerge as a phenomenon in the federal campaign process" (see Pet. p. 30a, n. 27).

Because Congress did not deal with contributions limitations to candidate draft movements in any way in the statutory provisions applicable in 1979, the Commission urged below (*id.*) that "the court must resort to the process of projecting how the legislature would have dealt with this concrete situation had it been able to address it." The Commission similarly asks this Court to intervene (Pet. p. 6) because it fears that a "proliferation of draft committees will severely damage the statutory scheme . . . ." But in this most sensitive area there is even less room than usual for courts to take on the legislative role, stretching limitations to cover private conduct which the legislature has not limited. Judicial adoption of the statutory expansion for which the Commission has repeatedly asked the Congress without success would be particularly inappropriate considering the major First Amendment issue which would arise from application of the statute's contribution limitations to candidate-draft groups. The existing limits on contributions to candidates and their committees were validated in *Buckley* only because of the "corruption" implications of large money contributions to a federal candidate—a rationale which has no applicability to draft organizations operating to induce a candidacy

[4] The 1979 amendments required draft groups to comply with reporting requirements (Pet. p. 32a), but, as the Court below put it, "not even a whisper about limiting contributions to 'draft' groups has ever been heard in the legislative history of FECA. It is therefore clear that Congress has never acted expressly to bring 'draft' groups within the coverage of contribution limitations" (Pet. p. 34a). In any event, the activities here in issue preceded the 1979 statutory amendments, which became effective on January 8, 1980.

rather than to promote an existing candidate's success. The magnitude of the First Amendment doubts arising from such an extension of the Act's contributions limitations makes it even less appropriate for courts to impose on candidate draft efforts contributions limitations which the Commission has not been able to persuade the Congress to adopt.

CONCLUSION

In finding the Commission without authority to investigate the 1979 draft-Kennedy activities, the ruling below correctly applies the *Buckley* ruling that only candidate support groups constitute "political committees" subject to the limitations of the statute. And in refusing to lend judicial enforcement to the Commission's investigation the lower Court correctly applies a vital line of this Court's rulings, which require not mere authority over the subject matter but a truly compelling governmental interest before privacy of political association and activity must be surrendered. When both predicates of the ruling below thus rest upon this Court's unassailable rulings, we respectfully suggest that there is no question presented worthy of this Court's review and certiorari should be denied.

Respectfully submitted,

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